Supreme Court, U.S.
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No.

In the Supreme Court of the United States

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

SIGMON COAL COMPANY, INC., AND JERICOL MINING, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.*, established the United Mine Workers of America Combined Benefit Fund (Fund) to ensure the continued provision of health-care benefits to retired miners and their dependents who worked under collective bargaining agreements that promised lifetime health-care benefits. For the purpose of calculating premiums to be paid to the Fund to finance those health-care benefits, the Coal Act directs the Commissioner of Social Security to assign responsibility for beneficiaries of the Fund to the "signatory operator" or "related person" of the signatory operator that formerly employed them, if that signatory operator (or related person) is still "in business." 26 U.S.C. 9706(a).

The question presented is whether the Coal Act permits the Commissioner to assign beneficiaries to the successor in interest of a signatory operator that is no longer in business.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Commissioner of Social Security, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 226 F.3d 291. The opinion and order of the district court (App., *infra*, 63a-64a, 65a-78a) are reported at 33 F. Supp. 2d 505. The orders of the Social Security Administration affirming the assignment of

responsibility for various individuals to respondents (App., *infra*, 45a-62a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 2000. A petition for rehearing was denied on November 15, 2000. App., *infra*, 81a-82a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 9701(c) of Title 26, United States Code, provides in pertinent part:

Terms relating to operators

For purposes of this section—

* * * * *

(2) Related persons

(A) In general

A person shall be considered to be a related person to a signatory operator if that person is—

(i) a member of the controlled group of corporations (within the meaning of [26 U.S.C. 52(a)]) which includes such signatory operator;

(ii) a trade or business which is under common control (as determined under [26 U.S.C. 52(b)]) with such signatory operator; or

(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person descibed in clause (i), (ii), or (iii).

STATEMENT

1. a. Congress enacted the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U.S.C. 9701 *et seq.*, in response to a crisis that threatened to deprive more than 100,000 retired coal miners and their dependents of promised lifetime health-care benefits. In the 1980s and 1990s, the financial stability of private multi-employer plans set up by the coal industry to finance those benefits was threatened by increasing health-care costs and the termination of employers' contribution obligations when they switched to non-union employees or left the coal mining business altogether. As more companies stopped contributing to the plans, the remaining contributors were forced to shoulder more of the costs, which in turn led to even more defections and created a downward spiral. See generally *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 504-514 (1998) (plurality opinion).

Congress's objectives in enacting the Coal Act were to "identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to [coal industry]

retirees," to "allow for sufficient operating assets for [coal industry retiree health-care benefit] plans," and to "provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans." Energy Policy Act of 1992, Pub. L. No. 102-486, § 19.42, 106 Stat. 3037. In furtherance of those ends, the Coal Act established the United Mine Workers of America Combined Benefit Fund (Combined Fund or Fund), a private multi-employer health benefit plan. The Combined Fund provides health-care benefits to beneficiaries who, at the time of passage of the Act, were receiving (or were eligible to receive) benefits from multi-employer plans established by collective bargaining in the coal industry. See 26 U.S.C. 9702, 9703(f). The Combined Fund is financed by premiums paid by the "signatory operator[s]" (or "related person[s]" of those signatory operators) that formerly employed the beneficiaries and that remain "in business." 26 U.S.C. 9704, 9706(a). The Act defines "signatory operator" as "a person which is or was a signatory to a coal wage agreement." 26 U.S.C. 9701(c)(1). The particular collective bargaining agreements with the United Mine Workers of America (Union) governing the coal industry that are included within the term "coal wage agreement" are set forth in 26 U.S.C. 9701(b)(1).

b. The Act delegates to the Commissioner of Social Security[1] (Commissioner) the task of assigning eligible

[1] Many references in the legislative record are to the Department of Health and Human Services, which at the time included the Social Security Administration. In 1995, the Social Security Administration became an independent agency within the Executive Branch, and the Commissioner of Social Security assumed the duties of the Secretary of Health and Human Services under the Coal Act. See Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 108(h)(9)(A), 108 Stat. 1487.

beneficiaries to signatory operators or related persons. 26 U.S.C. 9706(a). Assignments are made according to a three-tiered hierarchy:

The Commissioner must first seek to assign a beneficiary to the "signatory operator" (or "related person") that remains "in business," signed a collective bargaining agreement with the Union in 1978 or later, and was the most recent signatory operator to employ the miner in the coal industry for at least two years. 26 U.S.C. 9706(a)(1). The Act specifies that "a person shall be considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry." 26 U.S.C. 9701(c)(7).

If an assignment of a particular beneficiary cannot be made under the first tier, the Commissioner must then attempt to assign the beneficiary to the signatory operator (or related person) that remains in business, signed a collective bargaining agreement with the Union in 1978 or later, and was the most recent signatory operator to employ the miner in the coal industry for any period of time. 26 U.S.C. 9706(a)(2).

If an assignment cannot be made under the first or second tiers, the Commissioner must then seek to assign the beneficiary to the signatory operator (or related person) that remains in business and employed the miner in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 collective bargaining agreement. 26 U.S.C. 9706(a)(3).[2]

[2] In *Eastern Enterprises*, this Court struck down as unconstitutional an application of the third tier under which the Commissioner assigned a beneficiary to a coal mine operator that

If an assignment cannot be made under any of the three tiers, then the beneficiary is considered "unassigned," and his health-care benefits are funded with money transferred from interest earned on the Abandoned Mine Reclamation Fund, 26 U.S.C. 9705(b), or, if that source of funds is exhausted or unavailable, from an additional premium imposed on all assigned signatory operators in a *pro rata* fashion. 26 U.S.C. 9704(d). Congress understood that a principal cause of the financial instability of the multi-employer plans in existence before the Combined Fund was the problem of retirees whose employers had terminated their contribution obligations, and so it intended that the number of unassigned beneficiaries under the Coal Act be kept to "an absolute minimum." 138 Cong. Rec. 34,003 (1992) (technical explanation by Sen. Wallop).

Because the Commissioner must determine whether a beneficiary can be assigned to either a signatory operator *or* any related person to a signatory operator under one of these tiers before proceeding to the next tier, the concept of "related person" is central to the operation of the Act. The Act sets forth the following explication of the kinds of relationships between entities that shall lead the Commissioner to consider an entity to be a "related person" to a signatory operator:

> A person shall be considered to be a related person to a signatory operator if that person is—

---

had not signed a collective bargaining agreement with the Union in 1974 or later. See 524 U.S. at 504 (plurality opinion); *id.* at 539 (opinion of Kennedy, J., concurring in the judgment and dissenting in part). The *Eastern Enterprises* decision is not directly relevant to this case, which does not involve assignments made under the third tier.

> (i) a member of the controlled group of corporations (within the meaning of [26 U.S.C.] 52(a)) which includes such signatory operator;
>
> (ii) a trade or business which is under common control (as determined under [26 U.S.C.] 52(b)) with such signatory operator; or
>
> (iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.
>
> A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

26 U.S.C. 9701(c)(2)(A).

Although Congress expressly provided for assignments to be made to the successor in interest of a person "related" to the signatory operator, the statute does not state *in haec verba* that an assignment may be made to a direct successor in interest of the signatory itself. The Commissioner has concluded, however, that in light of the text, structure, and purposes of the Coal Act, Congress intended to reach those successors as well if the signatory operator is defunct and if there is no other "related person" to that operator. See Social Security Administration Supplemental Coal Act Review Instructions No. 4 (July 1995); App., *infra*, 83a-94a. The Commissioner has, in addition, concluded that a business should be deemed a successor in interest of a signatory operator or other related person if it has,

through purchase, merger, or other transaction, acquired substantial assets from the signatory or its related person, if it continues running the same operation in the same location, and if it uses many of the same employees who worked for the former owner. *Id.* at 86a.

c. When the Commissioner assigns a Combined Fund beneficiary to a signatory operator or related person, he so notifies the assigned operator, 26 U.S.C. 9706(e)(2), which then has 30 days to request "detailed information as to the work history of the beneficiary and the basis of the assignment," 26 U.S.C. 9706(f)(1). After receiving that information, the assigned operator has an additional 30 days to request review of the assignment decision. 26 U.S.C. 9706(f)(2). If, on review, the Commissioner determines that an assignment was incorrect, he rescinds the assignment and reviews the beneficiary's record to determine whether the beneficiary should be assigned to another operator. 26 U.S.C. 9706(f)(3)(A). If the Commissioner determines that there was no error in the assignment, he so notifies the assigned operator. 26 U.S.C. 9706(f)(3)(B).

3. In this case, the Commissioner assigned 86 beneficiaries of the Combined Fund to the Jericol Mining Corporation on the ground that Jericol was the successor in interest of a company that was the pertinent signatory operator. Those 86 beneficiaries are miners (or widows or dependents of miners) who had worked for the Shackleford Coal Company, a family-owned coal mining company located in Kentucky. In 1973, Irdell Mining, Inc., bought Shackleford's coal mining assets. App., *infra*, 10a. The sales contract provided that Irdell would assume responsibility for Shackleford's outstanding contracts, including its collective bargaining agreement with the Union. *Ibid.* Irdell also acquired

the right to use the Shackleford name. Shortly thereafter, the original Shackleford went out of business. Irdell, however, continued to operate Shackleford's mines under the existing collective bargaining agreement, using the name of Shackleford and using many of the original Shackleford's former employees. *Id.* at 10a-11a. While it was using the Shackleford name, Irdell signed the 1974 national coal wage agreement with the Union. *Id.* at 11a.

Shackleford eventually changed its corporate name to Jericol Mining, Inc., one of the plaintiffs in this action. App., *infra*, 11a. Jericol continued the coal mining operations that it had conducted under the Shackleford corporate name (*ibid.*) and retained the Employer Identification Number it had used to pay Social Security taxes for its employees under the Shackleford name. *Id.* at 47a.

4. In a series of assignment decisions made between 1993 and 1996, the Commissioner assigned Jericol 86 Combined Fund beneficiaries who were employed by (or who are widows or dependents of miners employed by) Shackleford. See C.A. App. 61-77, 96-124, 136-156. Jericol filed administrative appeals of those assignment decisions. *Id.* at 78-81, 125-135, 157-168. The Commissioner denied those appeals on the ground that Jericol is the successor in interest of Shackleford. App., *infra*, 45a-62a. In a representative decision, the agency explained:

> The sales contract [Jericol] submitted shows that Irdell Mining purchased the assets of Shackleford Coal, that Shackleford Coal was required to maintain the goodwill of its customers, allowed Irdell to use the name of Shackleford after the purchase, transferred responsibility for *all* outstanding con-

> tracts and agreements, and required that non-compete agreements be signed and submitted at the time of closing. You have also advised us that Irdell did conduct business under the Shackleford name and subsequently changed the company's name to Jericol Mining.

Id. at 48a-49a. The agency therefore concluded that Jericol is responsible for the Combined Fund premiums for retirees and their dependents who worked for Shackleford. *Id.* at 49a.

5. a. Respondents Jericol and Sigmon Coal Company, Inc., challenged the final administrative decisions in district court.[3] They argued that the Coal Act does not permit the Commissioner to assign Combined Fund beneficiaries to the direct successor in interest of a defunct signatory operator. The district court agreed, and granted respondents' motion for summary judgment. App., *infra*, 63a-78a.

b. The Commissioner appealed, and a divided panel of the court of appeals affirmed. App., *infra*, 1a-44a. The majority concluded that the Coal Act does not authorize the Commissioner to assign Fund beneficiaries to the direct successor in interest of a signatory operator that is no longer in business. The majority first rejected (*id.* at 24a-26a) the Commissioner's position that the text of the Coal Act's "related person" provision itself permits assignment to the direct

[3] The district court remarked that Sigmon appears to have joined Jericol as a plaintiff in this case because Sigmon is a "related person" to Jericol and thus is jointly and severally liable for premiums owed by Jericol. See App., *infra*, 66a n.3; see also 26 U.S.C. 9704(a) ("Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.").

successor of an original signatory. The Commissioner had pointed out that Section 9701(c)(2)(A) expressly authorizes assignments to the successor in interest of "any person described" in clauses of (i), (ii), or (iii) of 26 U.S.C. 9701(c)(2)(A), and had argued that the original signatory operator itself is one of the persons "described" in those provisions because each of the pertinent clauses in turn describes a group or family of related companies that expressly includes the signatory operator itself. The majority rejected that construction and concluded that the clauses defining "related person," read in context, identify only classes of persons that have a relationship to the signatory operator but do not include the signatory operator itself. App., *infra*, 24a-25a. Thus, the majority ruled, although the text of the Coal Act does expressly authorize an assignment to the successor in interest of a person related to a signatory operator, it does not expressly provide for an assignment to the direct successor in interest of the signatory operator itself. *Id.* at 25a-26a.

Second, the majority, expressly disagreeing with the decision in *R.G. Johnson Co.* v. *Apfel*, 172 F.3d 890 (D.C. Cir. 1999), rejected the submission that the Coal Act should be construed to permit assignments to direct successors in interest in order to avoid absurd results that would be inconsistent with the objectives of the statute. App., *infra*, 27a-32a. In *R.G. Johnson*, the District of Columbia Circuit sustained assignments to the direct successor in interest of a signatory operator after concluding that the failure to permit such assignments would frustrate Congress's intent to stabilize the financing of the Fund and to place responsibility for that financing on the businesses most responsible for plan liabilities. 172 F.3d at 895. The panel majority in the court below, however, concluded instead that

Congress might reasonably decide to promote sales of coal companies by shielding a direct purchaser of the signatory operator's assets from additional liabilities not contemplated in the original transaction. App., *infra*, 33a-34a. The majority did acknowledge some anomaly in a statutory scheme that expressly permits liability to attach to the successor to a person "related" to the original signatory while shielding from liability the direct successor of the original signatory itself (*id.* at 35a), as well as legislative history supporting the Commissioner's construction (*id.* at 30a-31a). But, the court concluded, "we are not simply free to ignore unambiguous language because we can imagine a preferable version." *Id.* at 34a.

c. Judge Murnaghan dissented. App., *infra*, 37a-44a. He agreed with the District of Columbia Circuit's decision in *R.G. Johnson* that a literal interpretation of the "related person" provision to exclude direct successors in interest of the signatory operator would conflict with Congress's clear purposes in enacting the Coal Act. *Id.* at 41a. Judge Murnaghan stressed that the Coal Act was intended to ensure that companies would not avoid responsibility for retirement benefits by structuring business transactions so as to dump retirement costs on other companies that remained bound to collective bargaining agreements, and that that objective would be frustrated if the obligation to pay statutory premiums could not also be placed on the direct successor of an original signatory. *Id.* at 41a-42a. Judge Murnaghan thus concluded that "[e]xcluding successors in interest to signatory operators from liability for Fund benefits is plainly inconsistent with Congress's intent in enacting the Coal Act." *Id.* at 44a.

The Commissioner filed a petition for rehearing en banc, which the court rejected by a vote of 7-2, with one judge not participating. App., *infra*, 81a-82a.

ARGUMENT

This case presents the same question as that presented by *Aloe Energy Corp.* v. *Apfel*, petition for cert. pending, No. 00-725 (filed Nov. 2, 2000). As we have explained in our response to the petition for a writ of certiorari (at 10-13) in *Aloe*, the question whether a direct successor in interest of a signatory operator may be assigned responsibility for Combined Fund beneficiaries under the "related person" provisions of the Coal Act merits review by this Court. There is a conflict on that issue in the courts of appeals. Whereas the Fourth Circuit, in the decision below in this case, has concluded that the Coal Act does not permit the Commissioner to assign responsibility for Fund beneficiaries to such direct successors in interest, App., *infra*, 35a, the District of Columbia Circuit, in a directly contrary decision, has concluded that the Coal Act does authorize such assignments, *R.G. Johnson*, 172 F.3d at 895. The Third Circuit has joined the District of Columbia Circuit in an unpublished decision, see *Aloe Energy Corp.* v. *Apfel*, No. 99-3915 (June 20, 2000), petition for cert. pending, No. 00-725. The issue has also arisen in the First Circuit, which rejected the Commissioner's position in *Eastern Enterprises* v. *Chater*, 110 F.3d 150, 155 (1997), rev'd on other grounds, 524 U.S. 498 (1998). See also *Holland* v. *New Era Coal Co.*, 179 F.3d 397, 401 (6th Cir. 1999) (assuming without discussion that assignments may be made to the successor in interest of a signatory operator).

The validity of assigning statutory premium responsibilities to the direct successor in interest of an

original signatory operator is a matter of substantial importance to the proper operation of the Coal Act. The Commissioner's authority to assign beneficiaries of the Combined Fund to an out-of-business signatory operator's successor in interest is implicated in many assignment decisions.[4] A broader adoption of the Fourth Circuit's conclusion that no such authority exists could significantly undermine Congress's determination that corporate entities closely related to the signatory operator should be responsible for the signatory operator's obligations, and it could also jeopardize the Fund's financial stability. If the Commissioner may not assign responsibility for a signatory operator's employees to a direct successor in interest of that signatory, he will be required to assign responsibility to entities that are more distantly related to the signatory operator, such as other corporations within the same control group, or to more remote successors in interest to those related corporations (which, respondents acknowledge, would be a proper assignment under the Coal Act), or to persons at the next tier under the Act's three-tier framework. If no such entities exist, then the Commissioner must deem the beneficiaries to be "unassigned," in which case their health-care benefits must be financed by transfers from the Abandoned Mine Reclamation Fund or (if those transfers are insufficient) contributions from other

[4] We are informed by the Social Security Administration that about 16,500 beneficiaries have been assigned to entities deemed "related" to an original signatory operator under the Coal Act's "related person" provisions. Although the SSA has not conducted a manual search of its records to determine how many of those "related person" assignments were made on the basis of a direct successorship, the SSA believes that direct-successor assignments constitute a substantial proportion of those assignments.

former signatory operators, which did not employ them. Those possibilities are contrary to Congress's intent that financial responsibility for miners' benefits be placed on those entities most responsible for plan liabilities. The question presented herein therefore warrants review by this Court.

The issue is clearly framed by the earlier-filed petition in *Aloe*, and so we submit that *Aloe* is an appropriate vehicle for this Court's resolution of the question presented. Although *Aloe* arises from an unpublished decision of the Third Circuit, there is a conflict on the issue presented between published decisions of the Fourth and District of Columbia Circuits. We therefore suggest that the Court hold the petition in this case pending its disposition of *Aloe*, and that the petition then be disposed of as appropriate in light of the Court's disposition of *Aloe*.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of the petition for a writ of certiorari in *Aloe Energy Corp.* v. *Apfel*, No. 00-725, and then disposed of as appropriate in light of the disposition of that case.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

FEBRUARY 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1219

SIGMON COAL COMPANY, INCORPORATED;
JERICOL MINING, INCORPORATED,
PLAINTIFFS-APPELLEES

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT-APPELLANT

TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, AMICUS CURIAE

Argued: Oct. 26, 1999
Decided: Aug. 29, 2000

Before: MURNAGHAN, WILKINS, and TRAXLER, Circuit Judges.

Affirmed by published opinion. Judge TRAXLER wrote the majority opinion, in which Judge WILKINS joined. Judge MURNAGHAN wrote a dissenting opinion.

OPINION

TRAXLER, Circuit Judge:

Under the Coal Industry Retiree Health Benefit Act of 1992 (the Coal Act), *see* 26 U.S.C.A. §§ 9701-9722 (West Supp. 1998), the Commissioner of the Social Se-

curity Administration ("Commissioner") assigns fiscal responsibility for a retired coal miner's health benefits to the most appropriate coal mining company which employed the retired miner or, if the assigned coal operator is no longer in business, to an entity or individual that qualifies as a "related person" to the defunct coal company. *See* 26 U.S.C.A. § 9706(a). In 1993, the Commissioner assigned eighty-six retired coal miners to the Jericol Mining Company ("Jericol") on the basis that Jericol was a successor in interest to, and therefore a "related person" to, an out-of-business mining company that had employed the retired miners. The district court determined, based on a literal reading of the statutory text, that a successor in interest to a defunct signatory operator cannot be held accountable under the Coal Act as a "related person" and voided the Commissioner's assignments. *See Sigmon Coal Co. v. Apfel*, 33 F. Supp.2d 505, 508-11 (W.D. Va. 1998). The Commissioner appeals, contending that the district court's literal reading of the statute frustrates congressional intent to provide broad coverage for retired coal miners by identifying the "most responsible" employers, and that, in light of the general congressional purpose and various snippets of legislative history, we should read the statutory definition of "related person" to include a successor in interest to a signatory operator.

We decline the Commissioner's invitation to rewrite the Coal Act. The statute is clear and unambiguous, and we are bound to read it exactly as it is written. Accordingly, we affirm the decision of the district court.

I.

A.

The Coal Act of 1992 was passed in an effort to remedy a faltering system of healthcare benefits for the nation's retired coal miners. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 504-15, 118 S. Ct. 2131, 141 L.Ed.2d 451 (1998). On a handful of occasions, this court has carefully detailed the history of the coal industry's attempt to establish, through collective bargaining, an adequate system of health and retirement benefits for coal miners and the resulting labor unrest and financial instability which led to the Coal Act of 1992. *See Holland v. Big River Minerals Corp.*, 181 F.3d 597, 600-01 (4th Cir. 1999), *cert. denied*, —— U.S. ——, 120 S. Ct. 936, 145 L.Ed.2d 814 (2000); *Holland v. Keenan Trucking Co.*, 102 F.3d 736, 738-39 (4th Cir. 1996); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1127-29 (4th Cir. 1996). We need not recount the full history of the coal miners' health and retirement benefits system. Nevertheless, since the Coal Act incorporates specific benefit plans established by the coal wage agreements, consideration of the statutory scheme at issue requires at least a rudimentary understanding of these plans.

Between 1950 and 1978, a series of National Bituminous Coal Wage Agreements ("coal wage agreements") between the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators Association ("BCOA") produced a number of multiemployer benefit plans. The 1950 coal wage agreement established a multiemployer fund to furnish health and retirement benefits for both coal miners and their dependents. *See Carbon Fuel*, 100 F.3d at 1127. Benefits under this fund, however, were determined at

the discretion of the trustees of the fund and were subject to reduction according to the fund's budget. *See Eastern Enterprises*, 524 U.S. at 506-08, 118 S. Ct. 2131. Thus, the miners were not guaranteed specific benefits.

In 1974, the UMWA and the BCOA entered into a coal wage agreement that expanded the benefits available under the 1950 coal wage agreement, creating four multiemployer plans to replace the 1950 fund:

> The 1974 [coal wage agreement] . . . divided the 1950 Plan into several separate multiemployer plans. It established a 1950 Pension Plan and Benefit Plan and a 1974 Pension Plan and Benefit Plan. The 1950 Benefit Plan provided health-care benefits to miners who retired prior to January 1, 1976, and their dependents. The 1974 Benefit Plan provided health-care benefits to miners who were active, or who retired on or after January 1, 1976, and their dependents.

Carbon Fuel, 100 F.3d at 1127. Significantly, the 1974 coal wage agreement promised, in contrast to the prior agreements, lifetime benefits. Signatory coal operators to the 1974 coal wage agreement pledged to finance both the 1950 Benefit Plan and the 1974 Benefit Plan, but their obligation to do so did not extend beyond the effective dates of the agreement. *See Eastern Enterprises*, 524 U.S. at 509-10, 118 S. Ct. 2131.

In 1978, the UMWA and the BCOA again reorganized the health-care benefit system for coal miners, this time moving toward decentralization. Under the 1978 coal wage agreement, a coal miner retiring on or after January 1, 1976, would be provided benefits by his last employer pursuant to an individual employer plan. The

1974 Benefit Plan continued to exist, but only to cover miners, known as "orphans," who had retired on or after January 1, 1976, and whose last employer was no longer participating in the multiemployer plans or had gone out of business. Likewise, the 1950 Benefit Plan would continue to afford benefits to miners who had retired prior to January 1, 1976 and their dependents. *See Carbon Fuel*, 100 F.3d at 1127. There were two other noteworthy features of the 1978 coal wage agreement. First, the agreement required signatory operators to provide defined benefits rather than defined contributions as under previous agreements. *See Holland*, 181 F.3d at 600-01. Second, the agreement included an "evergreen" clause requiring signatories to continue contributing even if they did not sign a subsequent agreement, as long as they remained in the coal industry. *See Eastern Enterprises*, 524 U.S. at 510, 118 S. Ct. 2131.

The series of coal wage agreements and the numerous restructurings to the coal miners' health benefit system effected by the coal wage agreements occurred against a backdrop of severe financial distress. By the latter part of the 1980s, the 1950 and 1974 Benefit Plans were facing the possibility of insolvency as many signatories to the 1978 coal wage agreement left the coal mining business, sending their retirees—now newly orphaned—back into the multiemployer 1974 Benefit Plan. An increasingly small number of signatories shouldered the burden of funding the plan, which was providing healthcare benefits—the cost of which were rising—for a growing number of orphaned retirees. *See id.* at 511, 118 S. Ct. 2131; *Carbon Fuel*, 100 F.3d at 1127. These factors, among others, created a vortex which simultaneously decreased funds and

increased beneficiaries, and threatened to undo the whole system.

The dire financial state of the 1950 and 1974 Benefit Plans ultimately spurred a lengthy strike in 1989 at the Pittston Coal Company, which, in turn, prompted the creation of the Advisory Commission on United Mine Workers of America Retiree Health Benefits ("Coal Commission") to devise a solution to the problem of health benefits for retired miners. Following the submission of recommendations by the Coal Commission, Congress passed the Coal Act of 1992.

B.

The Coal Act of 1992 established two new multi-employer health benefit funds. The first of these, the United Mine Workers of America Combined Benefit Fund ("the Combined Fund"), resulted from the merger of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan. *See* 26 U.S.C.A. § 9702(a)(2). In general terms, the Combined Fund provides health benefits to retired miners (or their dependents) who were eligible to receive benefits from the 1950 or the 1974 Plan and were receiving benefits as of July 20, 1992. *See* 26 U.S.C.A. § 9703; *see also Eastern Enterprises*, 524 U.S. at 514, 118 S. Ct. 2131; *Holland*, 181 F.3d at 601. The second fund established by the Coal Act, the UMWA 1992 Benefit Plan, provides health benefits "to any eligible beneficiary who is not eligible for benefits under the Combined Fund." 26 U.S.C.A. § 9712(b)(1).[1]

[1] Thus, the UMWA 1992 Benefit Plan covered retired miners who were eligible for but were not drawing benefits under the 1950 or 1974 UMWA Benefit Plans and who were also not receiving benefits under an individual employer plan. *See Holland*, 181 F.3d at 601.

We are concerned here only with the Combined Fund.[2]

The Coal Act charges the Commissioner with assigning responsibility under the Combined Fund for each eligible retiree to an appropriate coal industry employer. The Commissioner is required, pursuant to a three-tiered priority scheme, to pair each retiree "to a signatory operator which (or any related person with respect to which) remains in business." 26 U.S.C.A. § 9706(a). An assigned signatory operator must pay an annual premium to the Combined Fund based largely on the number of beneficiaries assigned to it. *See* 26 U.S.C.A. § 9704. A "signatory operator" is "a person which is or was a signatory to a coal wage agreement." 26 U.S.C.A. § 9701(c)(1). For purposes of the Coal Act, a signatory operator "remains in business" if it "conducts or derives revenue from any business activity, whether or not in the coal industry." 26 U.S.C.A. § 9701(c)(7).

In assigning retirees to signatory operators, the Commissioner must observe the following priority scheme:

(1) First, to the signatory operator which—

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

[2] The Coal Act also required coal operators to continue the individual employer plans established under the 1978 coal wage agreement or a subsequent coal wage agreement. *See* 26 U.S.C.A. § 9711.

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

26 U.S.C.A. § 9706(a)(1)-(3).

Even if there are no signatory operators that remain in business to whom a retiree can be assigned, responsibility for the retiree's Combined Fund benefits may still be attached to anyone qualifying as a "related person" to a signatory operator that would have been responsible for benefits had it remained in business. *See* 26 U.S.C.A. § 9704(a) ("Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by

such operator."). The Coal Act defines a "related person" as follows:

(2) Related Persons.—

(A) In general.—A person shall be considered to be a related person to a signatory operator if that person is—

(i) a member of the controlled group of corporations (within the meaning of section 52(a) [of the Internal Revenue Code]) which includes such signatory operator;

(ii) a trade or business which is under common control (as determined under section 52(b) [of the Internal Revenue Code]) with such signatory operator; or

(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

26 U.S.C.A. § 9701(c)(2)(A). According to the language of the statute, even if the signatory operator and its related persons are defunct, coverage for the retiree can be assigned to a "successor in interest" to a related person. The term "successor in interest," however, is

left undefined by the Coal Act. A related person or its successor in interest is not liable for Combined Fund premiums unless the related person was related as described in section 9701(c)(2)(A) "as of the time immediately before such operator ceased to be in business." 26 U.S.C.A. § 9701(c)(2)(B).

In the event there is no signatory operator or related person remaining in business, and there is no successor in interest to any entity that is "related" to a signatory operator within the meaning of section 9701(c)(2)(A), then the retiree or his dependents are unassigned but not uncovered. The Coal Act requires the assigned signatory operators to cover the benefits for the unassigned miners on a pro rata basis. *See* 26 U.S.C.A. § 9704(d). The premiums paid on behalf of the unassigned miners' benefits are reduced by the transfer of funds from the Abandoned Mine Land Reclamation Fund (the "AML Fund"). *See* 26 U.S.C.A. § 9705(b); 30 U.S.C.A. § 1232(h) (West Supp. 1998).

C.

In 1973, Irdell Mining, Incorporated ("Irdell") bought the coal mining operating assets of the Shackleford Coal Company ("Shackleford"), a family-owned coal mining company in Kentucky. There was no common ownership between Irdell and Shackleford. According to the terms of the asset purchase agreement, Irdell assumed responsibility for Shackleford's contractual and lease arrangements, including the collective bargaining agreement with the United Mine Workers. Otherwise, Irdell did not assume Shackleford's liabilities. Following the sale of assets, Shackleford changed its name to Kelly & Associates, which dissolved shortly after the sale. For several years after the sale, Irdell used the

Shackleford name, which it was permitted to do pursuant to the asset purchase agreement. Eventually, it changed its name to Jericol Mining Company. It is undisputed that Jericol continued Shackleford's coal operations, using many of Shackleford's employees. Jericol, while it was using the Shackleford name, signed the 1974 coal wage agreement that expired in 1977. Jericol did not sign any subsequent agreements.

From September 1993 to September 1997, the Commissioner assigned to Jericol, in piecemeal fashion, eighty-six coal miners who had retired from Shackleford and qualified as Combined Fund beneficiaries. These retirees worked for Shackleford, but they retired prior to the asset sale and thus never worked for Jericol. The Commissioner's original notice of assignment to Jericol explained that these retirees were assigned on the basis that Jericol was a "related person" to Shackleford, a signatory operator that would have been the assignee had it not been defunct:

> Our records and UMWA records indicate that you are related to the signatory operator named below [Shackleford] who is no longer in business. This operator would have been responsible under the law for the miner named below under the rules for how we assigned responsibility. . . . Therefore, as a related company you must assume responsibility.

J.A. 64. Jericol requested that the Commissioner reconsider the assignment, disputing that it was a "related person" to Shackleford within the meaning of the Coal Act. The Commissioner reaffirmed the series of assignments of Shackleford's retirees to Jericol, however, indicating that Jericol was responsible as a "successor in interest" to Shackleford. In confirming his

decision, the Commissioner provided Jericol with a number of written explanations which were substantially identical:

> While Jericol admits purchasing part of Shackleford's assets in 1973, the company maintains it was not a successor in interest. However[,] Jericol adopted use of the Shackleford name, continued to operate under Shackleford's UMWA agreement and otherwise acted as its successor. Therefore Jericol is Shackleford's successor. Shackleford was the last coal company to empioy the miner. Since Shackleford is a pre-78 signatory and employed the miner for more than 24 months the assignment must be made under category three. Shackleford employed the miner longer than any other coal company that is still active or has an active related company. Therefore the original assignment was correct.

J.A. 94.

Jericol then brought this action, seeking a determination that it is not responsible for the Shackleford retirees. The district court concluded that under section 9701(c)(2)(A), a successor in interest to a defunct signatory operator (assuming Shackleford is one) cannot be held accountable as a "related person" to that signatory operator, reasoning that because Jericol did not succeed to any person described in clauses (i), (ii), or (iii) of section 9701(c)(2)(A), it did not qualify as a "related person" to Shackleford under the unvarnished terms of the statute. *See Sigmon Coal*, 33 F. Supp.2d at 510. The Commissioner argued that, regardless of the language of the statute, the court should read the definition of "related person" to include a successor in interest to a signatory operator because, when applied

literally, the statute leads to results that are absurd or, at the very least, much different from what Congress intended. The district court rejected this argument, finding the meaning of the statute clear on its face. *See id.* at 510-11. Thus, the district court held that the clear and unambiguous language obviated the need for it to defer to the Commissioner's interpretation under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). The Commissioner then brought this appeal.

II.

First, we must determine whether we have subject matter jurisdiction to reach the substantive issues raised in this appeal. The parties did not raise this issue in either their briefs or at oral argument. Subsequently, the Commissioner, pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, raised the possibility that the district court lacked jurisdiction under *Pittston Co. v. United States*, 199 F.3d 694 (4th Cir. 1999), a decision that was issued following oral argument in this case.

We are duty-bound to clarify our subject matter jurisdiction even if the parties do not develop it as an issue. *See Cook v. Georgetown Steel Corp.*, 770 F.2d 1272, 1274 (4th Cir. 1985) ("Although plaintiffs have not questioned the district court's jurisdiction, lack of subject matter jurisdiction is an issue that requires sua sponte consideration when it is seriously in doubt."). Unlike personal jurisdiction, subject matter jurisdiction cannot be waived. *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704, 102 S. Ct. 2099, 72 L.Ed.2d 492 (1982). Accordingly, we

must address the basis of our jurisdiction even when the parties do not pursue the topic of subject matter jurisdiction full bore. *See United States v. White*, 139 F.3d 998, 999-1000 (4th Cir.), *cert. denied*, 525 U.S. 933, 119 S. Ct. 343, 142 L.Ed.2d 283 (1998).

Thus, we directed the parties to submit supplemental briefs on the following question:

> Whether, in light of this court's holding that Coal Act premiums are taxes, *see Pittston Co. v. United States*, 199 F.3d 694, 701-03 (4th Cir. 1999); *UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co.* (*In re Leckie Smokeless Coal Co.*), 99 F.3d 573, 583 (4th Cir. 1996), and the federal courts' lack of jurisdiction to consider "suit[s] for the purpose of restraining the assessment or collection of any tax," 26 U.S.C.A. § 7421(a) . . . , the court has jurisdiction over this action.

The parties submitted supplemental briefs, and we now address the district court's subject matter jurisdiction.

A.

The Anti-Injunction Act, *see* 26 U.S.C.A. § 7421(a) (West Supp. 2000), and the tax-exclusion provision of the Declaratory Judgment Act, *see* 28 U.S.C.A. § 2201(a) (West 1994), reflect "[t]he congressional antipathy for premature interference with the assessment or collection of any federal tax." *Bob Jones University v. Simon*, 416 U.S. 725, 732 n. 7, 94 S. Ct. 2038, 40 L.Ed.2d 496 (1974). The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the

person against whom such tax was assessed." 26 U.S.C.A. § 7421(a). The Act has two primary objectives: "efficient and expeditious collection of taxes with 'a minimum of pre-enforcement judicial interference,' and protection of the collector from litigation pending a refund suit." *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 12, 95 S. Ct. 13, 42 L.Ed.2d 7 (1974) (per curiam) (quoting *Bob Jones*, 416 U.S. at 736-37, 94 S. Ct. 2038). Unless an exception to the Anti-Injunction Act applies, "the legal right to the disputed sums [must] be determined in a suit for a *refund*." *Bob Jones*, 416 U.S. at 736 (emphasis added) (internal quotation marks omitted).

The Declaratory Judgment Act provides that "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration" unless the action seeks a declaration of rights or legal relations "*with respect to Federal taxes*." 28 U.S.C.A. § 2201(a) (emphasis added). Even "[t]hough the Anti-Injunction Act concerns federal courts' subject matter jurisdiction and the tax-exclusion provision of the Declaratory Judgment Act concerns the issuance of a particular remedy, the two statutory texts are, in underlying intent and practical effect, coextensive." *UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co.* (*In re Leckie Smokeless Coal Co.*), 99 F.3d 573, 583 (4th Cir. 1996).

In *Leckie*, we concluded that, for purposes of the Anti-Injunction Act and the tax-exclusion provision of the Declaratory Judgment Act, Coal Act premiums are taxes. *See Leckie*, 99 F.3d at 583; *see also Pittston*, 199 F.3d at 702. Thus, any action that can be construed as

having "the purpose of restraining the assessment or collection" of Coal Act premiums, *i.e.*, taxes, potentially strips us of jurisdiction under the Anti-Injunction Act and runs afoul of the tax-exclusion provision of the Declaratory Judgment Act.

However, "the Anti-Injunction Act 'was not intended to bar an action where . . . Congress has not provided the plaintiff with an alternative legal way to challenge the validity of a tax.'" *Leckie*, 99 F.3d at 584 (ellipsis in original) (quoting *South Carolina v. Regan*, 465 U.S. 367, 370-71, 104 S. Ct. 1107, 79 L.Ed.2d 372 (1984)). *Leckie* involved an effort by bankrupt coal operators to secure a declaration from the bankruptcy court that the purchasers of their assets would not be liable for Coal Act premiums as successors in interest to the bankrupt coal operators. We concluded that the bankrupt coal operators "[did] not have any 'alternative legal way' to challenge the imposition of Coal Act successor liability on the purchasers of their assets." *Id.* The *Leckie* operators "need[ed] to know whether they [could] sell their assets free and clear of liability for their Coal Act premiums," *id.*, that is, they were challenging Coal Act premiums on potential purchasers, not their own Coal Act liability. The Anti-Injunction Act and the Declaratory Judgment Act therefore did not preclude the *Leckie* court from considering the merits because "the Coal Act [does not] provide any means by which a coal operator can challenge the imposition of successor liability on a third party." *Id.*

In *Pittston*, we considered whether it was proper for coal operators to assert a constitutional challenge to premiums they were required to pay under the Coal Act via a tax refund action against the United States.

See Pittston, 199 F.3d at 699. Rejecting the idea that the Coal Act provides the exclusive procedure by which a coal operator can obtain a refund of premiums paid on behalf of an incorrectly assigned retiree, we held that "a tax refund action is an appropriate vehicle for Pittston to use to seek recovery of . . . Coal Act premiums." *Pittston*, 199 F.3d at 704. In doing so, we underscored our holding in *Leckie* that Coal Act premiums are taxes. *Id.* at 702. The coal operators in *Pittston*, however, sought no injunctive or declaratory relief; they simply sought a refund of their Coal Act premiums.

B.

Jericol's action against the Commissioner includes a request for both declaratory and injunctive relief. The complaint seeks an order (1) declaring "that neither Jericol nor Sigmon is a successor in interest to Shackleford within the meaning of 26 U.S.C. § 9701(c)(2)(A)," J.A. 13, (2) "enjoin[ing] the Commissioner from assigning any Shackleford retirees to [Jericol] in the future," J.A. 14, and (3) "direct[ing] the Commissioner to (i) withdraw the assignment of Shackleford's retirees to Jericol, and (ii) inform the Combined Fund that such assignments have been withdrawn," J.A. 13. In its complaint, Jericol asserted that three specific statutory bases vested the district court with subject matter jurisdiction: the Declaratory Judgment Act; the Administrative Procedures Act ("APA"); *see* 5 U.S.C.A. § 704 (West 1996); and sections 9706 and 9721 of the Coal Act. Jericol has not paid the Coal Act premiums on behalf of the retirees whom Jericol claims were improperly assigned to it.

The Commissioner contends that the Anti-Injunction Act and the Declaratory Judgment Act deprived the

district court of authority to consider Jericol's action. According to the Commissioner, the relief that Jericol seeks—an order requiring the Commissioner to withdraw assignments made to Jericol—would have the eventual effect of preventing the collection of Coal Act taxes because "[i]t is . . . the Comissioner's assignment of a beneficiary to an operator that gives rise to that operator's liability for premiums under the [Coal] Act." Supplemental Brief of Appellant at 5. The Commissioner contends that, even if Jericol's action does not directly impede the collection or assessment of taxes, this action is aimed at restraining a preliminary step to the actual collection of Coal Act premiums and thus falls within the purview of the Anti-Injunction Act. *See Bob Jones*, 416 U.S. at 731-32, 94 S. Ct. 2038; *Clark v. United States* (*In re Heritage Church & Missionary Fellowship*), 851 F.2d 104, 105 (4th Cir. 1988) (per curiam). And, argues the Commissioner, unlike the coal operators in *Leckie*, Jericol has several alternative means of challenging the assignment of the retirees, depriving the district court of subject matter jurisdiction. *See Leckie*, 99 F.3d at 584. Having carefully considered the supplemental briefs of the parties and the *Amicus Curiae*, we conclude that neither *Leckie* nor *Pittston* precluded the district court from exercising jurisdiction.

The Coal Act itself provides a specific scheme for coal operators such as Jericol to challenge the assignment of retirees by the Commissioner under section 9706. Section 9706(f) prescribes a procedure for obtaining administrative review of beneficiary assignments by the Commissioner and contemplates that the administrative procedure will be subject to judicial review. First, an assigned operator that is dissatisfied with an

assignment may "request from the Commissioner . . . detailed information as to the work history of the beneficiary and the basis of the assignment." 26 U.S.C.A. § 9706(f)(1). If an examination of this material does not persuade the assigned operator that the assignment was appropriate, the operator may then request review of the assignment by the Commissioner who "shall conduct such review if . . . the operator provided evidence with the request constituting a prima facie case of error." 26 U.S.C.A. § 9706(f)(2). Regardless of whether the Commissioner ultimately determines that the assignment was or was not in error —or that assigned operator did or did not present a prima facie case of error—the "determination by the Commissioner . . . under paragraph (2) or (3) shall be final." 26 U.S.C.A. § 9706(f)(4). The final decision of the Commissioner is subject to review "by a court under this subsection." 26 U.S.C.A. § 9706(f)(5). As a final agency decision, the review process is governed by the APA. *See* 5 U.S.C.A. § 704; *Dixie Fuel Co. v. Commissioner of Social Security*, 171 F.3d 1052, 1057-58 (6th Cir. 1999) (applying APA review to Commissioner's assignment of beneficiaries in an action for injunctive relief); *Lindsey Coal Min. Co. v. Chater*, 90 F.3d 688, 691 (3rd Cir. 1996) (applying APA review to Commissioner's assignment of beneficiaries in an action seeking declaratory relief). Of course, the APA is not an independent grant of subject matter jurisdiction to the federal courts. *See Califano v. Sanders*, 430 U.S. 99, 107, 97 S. Ct. 980, 51 L.Ed.2d 192 (1977). Rather, 28 U.S.C.A. § 1331 serves as the jurisdictional basis for federal courts "to review agency action." *Id.* at 105, 97 S. Ct. 980. The Coal Act clearly anticipates that this review scheme will apply to the Commissioner's assignment of beneficiaries and that, accordingly, a district

court will have the power to review such assignment and issue appropriate relief.

Here, unlike *Leckie*, the assigned operator is simply following a procedure mapped out in the Coal Act specifically for this situation. *See Leckie*, 99 F.3d at 584. The coal companies in *Leckie* were not seeking review of the Commissioner's assignments, as specifically permitted in the statute; rather, they were seeking a declaration with respect to Coal Act liabilities of a third party, a question for which there was no adequate remedy under the Coal Act or outside of it. (For example, the *Leckie* coal operators could not seek relief under 26 U.S.C.A. § 7422.) *See id.* (noting that "the Coal Act itself [does not] provide any means by which a coal operator can challenge the imposition of successor liability on a third party").

This distinction is pivotal. "It is a basic principle of statutory construction that when two statutes are in conflict, a specific statute closely applicable to the substance of the controversy at hand controls over a more generalized provision." *Farmer v. Employment Sec. Comm'n of North Carolina*, 4 F.3d 1274, 1284 (4th Cir. 1993). Thus, "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153, 96 S. Ct. 1989, 48 L.Ed.2d 540 (1976) (internal quotation marks omitted). Congress has expressly provided a method for coal operators to obtain review of the assignment of beneficiaries under section 9706(a). Because the Coal Act specifically addresses this issue, we conclude that the Coal Act, not the more general Anti-Injunction Act, controls the jurisdictional analysis.

Nevertheless, the Commissioner contends that the language of section 9706(f)(5) supports the argument that the Anti-Injunction Act applies because section 9706 creates, if anything, only a "post-payment remedy." Section 9706(f)(5) provides that "[a]n assigned operator shall pay the premiums under section 9704 *pending review* by the Commissioner of Social Security or by a court under this subsection." The Commissioner submits that this language is more consistent with a tax refund action than with an action for injunctive or declaratory relief, and supports the policy of the Anti-Injunction Act to facilitate the collection of tax revenue. At bottom, the Commissioner is arguing that the phrase "pending review" created a jurisdictional barrier for the district court.

We are not convinced. First, the language of the statute does not indicate or imply that the district court is deprived of jurisdiction to review the Commissioner's assignments unless the assigned premiums have first been paid. And, we do not perceive section 9706(f)(5) to preclude the possibility of declaratory or injunctive relief. Indeed, Jericol could seek precisely the same type of relief it now seeks whether or not it paid its premiums pending review. Second, the structure of section 9706(f) suggests otherwise. The requirement that the assigned operators pay their premiums "pending review . . . by a court" applies just as forcefully "pending review by the Commissioner of Social Security." But, the statute makes clear that this is not a prerequisite to review by the Commissioner who "*shall* conduct such review if the Commissioner finds . . . a prima facie case of error." 26 U.S.C.A. § 9706(f)(2) (emphasis added). Nothing in the language of the statute indicates that Congress meant for the

phrase "pending review" to apply differently to review by a court. Third, the Coal Act provides an incentive to make timely premium payments to the Combined Fund in that it imposes penalties for failure to do so. *See* 26 U.S.C.A. § 9707. Consequently, the requirement that assigned operators pay their premiums pending review is not a hollow provision.

We likewise believe that *Pittston* is a different case from the one before us and does not curtail the jurisdiction of a district court in an action simply challenging the Commissioner's assignment of beneficiaries under section 9706(a). We say this primarily because we were not required in *Pittston* to address the applicability of the Anti-Injunction Act or the tax-exclusion provision of the Declaratory Judgment Act. *Pittston* held that a tax refund action was "an appropriate vehicle" for a coal operator that was seeking the repayment of Coal Act premiums based on its contentions that (1) the Coal Act violated a number of constitutional principles as applied; and (2) the premiums had been improperly calculated. *See Pittston*, 199 F.3d at 699. Thus, nothing in *Pittston* precludes the exercise of jurisdiction in an action like this one.[3]

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[3] Moreover, we note that the premium miscalculation claim in *Pittston* does not appear to be a claim that even fits under section 9706(f). The review procedures set forth in section 9706(f) are confined specifically to the *assignment* of Coal Act beneficiaries to signatory operators or their "related persons." *See* 26 U.S.C.A. § 9706(f)(2) ("An assigned operator may . . . request review of the assignment."). Section 9706(f) does not, however, provide review for an improperly calculated premium; thus, the proper recourse for a miscalculation claim would be, as we explained in *Pittston*, through either a tax refund action or through additional overpayment remedies provided under the Coal Act or ERISA. *See Pittston*, 199 F.3d at 703-04.

Under the circumstances of this case, we find that the exercise of jurisdiction is appropriate.[4]

III.

Having concluded that the district court had subject matter jurisdiction, we now turn to the merits. The Commissioner advances a two-fold argument. First, he contends that the district court misread the statute and that, in fact, a straight reading of the final paragraph of section 9701(c)(2)(A) shows that a successor in interest to a signatory operator qualifies as a related person, which would permit the assignment of the retirees and beneficiaries to Jericol. Second, the Commissioner argues that if the district court's reading of the statutory text is correct, it is a reading that produces inexplicable, anomalous results that are clearly at odds with congressional intent. In support of this second argument, the Commissioner urges us to follow *R.G. Johnson Co. v. Apfel*, 172 F.3d 890, 894-96 (D.C. Cir. 1999), a split-panel decision of the District of Columbia Circuit Court of Appeals sanctioning just such an approach.[5]

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[4] Our conclusion is consistent with *Eastern Enterprises*, which affirmed the exercise of jurisdiction over an action for declaratory and injunctive relief, although the Court did not expressly consider the same jurisdictional issue we consider here. *See Eastern Enterprises*, 524 U.S. at 519- 22, 118 S. Ct. 2131.

[5] In order to resolve the issue presented to us, we need not address Jericol's argument to the extent it suggests that under the Coal Act, the terms "successor" and "successor in interest" are distinct, *see Leckie*, 99 F.3d at 585 n.15, and that Jericol does not qualify as a "successor in interest" to Shackleford. Like the district court, we leave these questions for another day, and we will

A.

We cannot agree with the Commissioner that a successor in interest to a signatory operator falls within the Coal Act's definition of "related person." Section 9701(c)(2)(A) establishes three categories of persons that qualify as "related persons" to signatory operators: (1) "member[s] of the controlled group of corporations . . . which includes such signatory operator[s]," 26 U.S.C.A. § 9701(c)(2)(A)(i); (2) "trade[s] or business[es]" that are "under common control" with the signatory operator, *see* 26 U.S.C.A. § 9701(c)(2)(A)(ii); and (3) certain persons having a partnership interest or engaged in a joint venture with a signatory operator, *see* 26 U.S.C.A. § 9701(c)(2)(A)(iii). The ultimate paragraph of section 9701(c)(2)(A) provides that "[a] related person shall also include a successor in interest of any person *described* in clause (i), (ii), or (iii)." 26 U.S.C.A. § 9701(c)(2)(A) (emphasis added).

Jericol does not qualify as a "related person" to Shackleford under clauses (i), (ii) or (iii) of section 9701(c)(2)(A), and the Commissioner does not suggest as much. Rather, he hangs his hat on the last paragraph, contending that "any person described in clause (i), (ii), or (iii)" includes signatory operators because the term "signatory operator" appears in each of the three clauses. Such a reading of the text, however, would require us to completely ignore the statutory context and read the phrase "signatory operator" in a vacuum. The final paragraph of section 9701(c)(2)(A) plainly says "successor in interest of any person described in clause

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simply assume, for analytical purposes, that Jericol is indeed a successor in interest to Shackleford, whatever the precise nuances of that term.

(i), (ii), or (iii)." Thus, to be a "related person" under the statute, Jericol must be a successor in interest to a person who is described by clause (i), (ii), or (iii). Shackleford, a signatory operator to whom Jericol succeeded in interest (according to the Commissioner's argument), is not *described* in any of these three predicate clauses. The text makes this self-evident by explaining that a person described in clause (i), (ii), or (iii) "shall be considered to be a related person *to a signatory operator*." 26 U.S.C.A. § 9701(c)(2)(A) (emphasis added). The statutory definition of "related person" obviously turns on the relationship a person or company has to a signatory operator. Each clause describes persons who are connected to a signatory operator in a way that justifies "related person" status. The inclusion of the term "signatory operator" in each clause just explains the connection. As the court observed in *R.G. Johnson*, to read this subsection as the Commissioner suggests would produce a nonsensical definition of "related person":

> Because the persons *described* in those clauses are described in terms of their relationship to the signatory operator, it would seem evident that they cannot include the signatory itself. To suggest otherwise is tantamount to saying "I am related to me." . . . [T]he Commissioner cannot overcome the fact that in order to be deemed a related person, a successor in interest must be one to a person described in those clauses.

R.G. Johnson, 172 F.3d at 894 (emphasis in original).

Like the Commissioner, the Trustees of the UMWA Combined Benefit Fund, as *Amici Curiae*, advance an argument that is based on a somewhat circular interpretation of the text: that "signatory operator" is necessarily described in clause (i) because, by definition, it is a member of a group "which includes such signatory operator." This is simply another version of the Commissioner's argument, and it suffers from the same contextual infirmity.

We are confident the Coal Act excludes a successor in interest to a signatory operator from the definition of "related person." The text makes this clear and unambiguous. Thus, we need not defer to the interpretation of the Social Security Administration. *See Chevron*, 467 U.S. at 842-43, 104 S. Ct. 2778.

B.

1.

If we apply the statute the way Congress has written it, the Commissioner fears that we will nevertheless do violence to what Congress probably intended and that our reading of the statute will lead to anomalous ends. If a literal reading of a statute produces an outcome that is "demonstrably at odds" with clearly expressed congressional intent to the contrary, *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989), or results in an outcome that can truly be characterized as absurd, *i.e.*, that is "'so gross as to shock the general moral or common sense,'" *Maryland State Dep't of Educ. v. United States Dep't of Veterans Affairs*, 98 F.3d 165, 169 (4th Cir. 1996) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 59-60, 51 S. Ct. 49, 75 L.Ed. 156 (1930)), then we can look

beyond an unambiguous statute and consult legislative history to divine its meaning. But, such instances are, and should be, exceptionally rare. *See TVA v. Hill*, 437 U.S. 153, 187 n. 33, 98 S. Ct. 2279, 57 L.Ed.2d 117 (1978). The intent of Congress as a whole is more apparent from the words of the statute itself than from a patchwork record of statements inserted by individual legislators and proposals that may never have been adopted by a committee, much less an entire legislative body—a truth which gives rise to "the strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n. 12, 107 S. Ct. 1207, 94 L.Ed.2d 434 (1987). Therefore, when the terms of a statute are clear and unambiguous, our inquiry ends and we should stick to our duty of enforcing the terms of the statute as Congress has drafted it. *See Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L.Ed. 442 (1917) ("[T]he sole function of the courts is to enforce [the statute] according to its terms."). This principle applies, too, in the face of an agency's construction of the statute that it administers. *See Chevron*, 467 U.S. at 842-43, 104 S. Ct. 2778 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). As a result, we are more than a little hesitant to abandon the presumption that Congress meant what it said, or did not say, when the words of a statute are plain, as they are here.

Pressing his argument that our reading of the statute contravenes congressional intent, the Commissioner points first to the congressional findings and declaration of policy prefacing the Coal Act. *See* Pub. L. No. 102-486, § 19142, 106 Stat. 3036, 3037 (1992). In light of

the troubled history that for decades dogged the system of multi-employer benefit plans for coal miners, Congress determined that "it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry *to identify persons most responsible for plan liabilities* in order to stabilize plan funding and allow for the provision of health care benefits to such retirees." Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3036, 3037 (1992) (emphasis added). According to the Commissioner, our reading of the definition of "related person" produces results that are at cross-purposes with the explicit congressional pronouncement that it intended "to identify persons most responsible for plan liabilities." Specifically, he questions the logic of imposing, as section 9701(c)(A)(2) clearly does, "related person" liability upon a successor in interest to a "related person" but not upon a successor in interest to the signatory operator itself. The Commissioner argues that there cannot be a more responsible person for Combined Fund liabilities than Jericol, a company that took over Shackleford's mining operation, used its name for a period of time, and agreed to assume Shackleford's responsibilities under its collective bargaining agreement with the UMWA. Apparently the only other circuit court of appeals to have considered this issue held, in a split panel decision, that such a result ran contrary to the general purpose of the Coal Act, reasoning that there was simply no good reason for such an odd result. *See R.G. Johnson*, 172 F.3d at 895.

We are not convinced, however, that the literal language of section 9701(c)(2)(A) is contrary to clearly expressed congressional intent. First, the general and somewhat vague statement of congressional findings in the preamble to the Coal Act does not impress us as the

kind of pellucid expression of legislative intent that would displace a specific textual provision that is clear and unambiguous. And, even if it were, we do not automatically agree with the Commissioner's apparent assumption that an asset purchaser like Jericol is obviously the "most responsible" person where these miners are concerned. After all, Jericol never actually employed any of the miners at issue; it is certainly not an absurd notion to think that a company which was under common financial control with Shackleford during the miners' employment (and therefore a "related person"), or a successor in interest to such a company, could be considered the "most responsible" person for Combined Fund purposes. As Jericol has suggested, the benefits conferred by the retired miners in this case ran to Shackleford and those in financial partnership with it. To the extent that the retired Shackleford miners conferred a benefit on Jericol, such as improving the physical assets of the operation or advancing the goodwill of the company through their hard work, Jericol presumably paid fair market value for these benefits under the terms of the asset purchase.

The Commissioner's position is not strengthened by the legislative history to which he and the *Amici* point us. First, they offer a statement made during the floor debate by one of the sponsors of the Coal Act which interpreted the definition of "signatory operator" under section 9701(c)(1) to include a successor in interest to the signatory operator. *See* 138 Cong. Rec. S17566-01, 17634 (daily ed. Oct. 8, 1992) (statement of Sen. Rockefeller). If we were presented with an ambiguous statute, such commentary might conceivably provide some interpretive guidance; however, even then such comments would be of limited use since they are directed at

the definition of "signatory operator" as opposed to "related person." But we have been asked to consider a statute that does not need interpretation. The statute simply does not encompass a successor in interest to a signatory operator. Moreover, a brief comment from the floor by a single legislator, albeit one of the Act's sponsors, is not conclusive evidence of what the entire legislative body believes. *See United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600, 102 S. Ct. 1957, 72 L.Ed.2d 358 (1982) ("Passing references and isolated phrases are not controlling when analyzing a legislative history.").

Second, the Commissioner offers portions of a document from the Congressional Record in an attempt to establish clear legislative intent to the contrary. Specifically, he points to a technical explanation of the Coal Act inserted into the Congressional Record by Senator Wallop which maintains that a "related person" includes "in specific instances successors to the collective bargaining agreement obligations of a signatory operator." 138 Cong. Rec. S17566-01, S17604 (daily ed. Oct. 8, 1992).[6] We refuse to displace a clear statutory provision which was passed by both houses of Congress and signed into law by the President with an explanation proffered by a single member of Congress. While worthy of consideration, it is simply not the sort of conclusive legislative history that would trump contrary language in the statute. *See Garcia v. United States*, 469 U.S. 70, 76-77, 105 S. Ct. 479, 83 L.Ed.2d 472

[6] The parties refer to this material as a proposed conference report. We agree that this material was never adopted by the Conference Committee, but prefer to describe the material as did the Senator who introduced it into the Congressional Record—as a technical explanation.

(1984) (preferring legislative history that reflects the collective understanding of a committee to the views of an individual legislator). We have found nothing in the Conference Report itself to suggest that other members of Congress signed on to this interpretation of the statute. *See* H.R. Conf. Rep. No. 102-1018 (1992). And, *R.G. Johnson* supports us on this score as well, observing that the relevant legislative history is inconclusive. *See R.G. Johnson*, 172 F.3d at 894.

We are satisfied that the legislative history on this point should not displace the language of the statute as a tool for determining congressional intent, especially when Congress included elsewhere in the statute language that the Commissioner wants us to read into the definition of "related person." For purposes of the UMWA 1992 Benefit Plan and the individual employer plans which the Coal Act kept in place, Congress specifically defined the term "last signatory operator" to include "a successor in interest of such operator." 26 U.S.C.A. § 9711(g)(1). Congress could easily have included this phrase in the final paragraph of section 9701(c)(2)(A). It did not do so, however, and we think this suggests that Congress acted intentionally when it omitted a successor in interest to a signatory operator from the definition of "related person." *See Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L.Ed.2d 17 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'").

Accordingly, we decline to defer to the legislative history in the face of clear statutory language.

2.

Finally, the Commissioner argues that we cannot follow the statute as it is written because the way Congress has drafted the "related person" definition begets, under the right set of circumstances, some fairly odd results. For instance, why would Congress allow a company that has literally taken over the coal mining production of a defunct signatory operator (assuming such a company is a successor in interest) to escape liability, but pin financial responsibility on a *successor in interest* to a company that was unrelated to the coal industry—say, a trucking company—merely because the trucking company and the signatory coal operator were under common financial control prior to the passage of the Coal Act? In light of the statutory purpose, says the Commissioner, it would have been wiser to make it the other way around.

We are not persuaded that there is no logic to shielding successors in interest to signatory operators from liability but not successors in interest to "related persons." Jericol submits, as did Judge Randolph in his dissent to *R.G. Johnson*, that such a provision (making successors in interest to "related persons" liable instead of successors in interest to signatory operators) promotes the sale of coal companies:

> Without the exemption, prospective purchasers can never be sure of their risks. Their liability would depend on whether, sometime in the future, the seller—that is, the signatory operator—ceases to "remain[ ] in business," a matter wholly outside their control.

R.G. Johnson, 172 F.3d at 896 (Randolph, J., dissenting). And, indeed, such an idea makes sense in view of the historical backdrop and legislative history, which suggest that perhaps Congress had good reason after all to pass section 9701(c)(2)(A) in its current version, the Commissioner's argument to the contrary notwithstanding. As observed in the Coal Commission's report to Congress, over half of the pre-Coal Act beneficiaries were "orphans" who were drawing benefits from a pot jointly funded by coal operators. *See* Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits, Coal Commission Report, Executive Summary VII (1990) (Coal Commission Report). A major complaint lodged by the coal operators was that they were being required to pay benefits for retired miners who never worked for them or maintained any other relationship with them. *See* 138 Cong. Rec. S17566-01, S17607 ("The coal companies that are still fully signatory to the bargaining agreement have complained that for every dollar they have been paying into the UMWA 1950 and 1974 Health Benefit Funds for their own retirees and dependents, they pay an additional three dollars on behalf of 'orphans' of other companies."). Imposing liability under the Combined Fund upon successors in interest to signatory operators would produce the same results because operators that did not receive the benefit of the retired miners' employment would nevertheless be responsible for them under the Combined Fund. In fact, such a requirement would arguably have put coal operators who purchased another operator's assets in a worse position since under the Act they are solely responsible for their assigned retirees. Jericol suggests that in an industry where buying and selling coal mining assets is commonplace, such a provision

would present a significant impediment to the coal companies' support for the Coal Act, which, in turn, would supply Congress with a motive for omitting the provision. Indeed, the scheme for assigning retirees to coal operators was a point of contention throughout the legislative process. *See* 138 Cong. Rec. S18250-02, S18250 (daily ed. Oct. 8, 1992) (statement of Sen. Glenn) ("[T]he coal industry retiree health benefits package before us today has been among the most contentious matters facing legislators this year.").

Clearly, the explanation Jericol offers is not indisputably evident from extra-textual sources; however, it is certainly plausible, and that is all we need to reject the assertion that the Coal Act's definition of "related person" is, on its face, absurd. And, we recognize that there is a counterpoint to the idea that Congress may have been trying to foster the sale or transfer of coal companies—that if this were truly a congressional aim, Congress would also have exempted a successor in interest to a "related person" when the "related person" is a company involved in the coal industry, rather than a trucking company or some other company that is not tethered to the coal industry. *See R.G. Johnson*, 172 F.3d at 895. But, even if this is true—if the literal text of the statute produces a result that is, arguably, somewhat anomalous—we are not simply free to ignore unambiguous language because we can imagine a preferable version. *See United States v. Sheek*, 990 F.2d 150, 153 (4th Cir. 1993) ("Even if the result appears to be anomalous or absurd in a particular case, the court may not disregard unambiguous language."). Perhaps it would be good policy to exempt successors in interest to "related persons" in the coal industry. As Judge Randolph observed, however, "Congress rarely has to

go as far as its logic would take it." *R.G. Johnson*, 172 F.3d at 896. For us to read into the statute language that is simply not there would require us to believe that the text as Congress drafted it produced an absurdity "'so gross as to shock the general moral or common sense.'" *Maryland State Dep't of Educ.*, 98 F.3d at 169 (quoting *Crooks*, 282 U.S. at 59-60, 51 S. Ct. 49). We see nothing in section 9701(c)(2)(A) to convince us that this is one of those rare instances in which we should stray from the words of the statute itself.

What we are being asked to do is improve the statute —to amend it, really. The Commissioner's reading of the statute may be appealing in terms of its logic, but we cannot adopt it as our own without trespassing on a function reserved for the legislative branch:

> [I]f Congress did not say what may appear more reasonable, and said something else, a court may not step in and perform a congressional, *i.e.*, legislative, act.
>
> . . . We must interpret statutes as written, not as we may wish for them to be written. Congress' role is to enact statutes; the judiciary's to interpret those statutes as written.

United States v. Childress, 104 F.3d 47, 53 (4th Cir. 1996).[7] Because our job is to determine the meaning of

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[7] We also decline the invitation of the *Amici* to use our interpretations of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), *see* 42 U.S.C.A. § 9601 (West 1995 & Supp. 1998), as an interpretive guide to section 9701(c)(2)(A) of the Coal Act. *See United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992) (adopting successor liability under CERCLA). Since the meaning of the text

the statute passed by Congress, not whether wisdom or logic suggests that Congress could have done better, we conclude that section 9701(c)(2)(A) does not affix "related person" liability upon a successor in interest to a signatory operator.

IV.

For the foregoing reasons, the decision of the district court is affirmed.

AFFIRMED.

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here is self-explanatory, there is no need for us to make a dubious attempt at determining whether the apparent intent of one Congress in enacting a statute is at all useful for discovering the intent of another Congress in enacting a separate, unrelated statute.

MURNAGHAN, Circuit Judge, dissenting:

Because the majority's adherence to the literal language of the Coal Act's definition of "related persons" produces a result demonstrably at odds with the intentions of its drafters, I respectfully dissent.

I.

The crisis in the coal industry that preceded the passage of the Coal Act resulted from the financial instability of the 1950 and 1974 Benefit Plans. In the 1978 Coal Wage Agreement, individual signatory operators assumed responsibility for providing health benefits for their post-1975 retirees and active workers. The 1978 Agreement retained the 1974 Benefit Plan as an "orphan" plan to provide health benefits for post-1975 retirees whose last employer had gone out of business. The 1950 Benefit Plan was also retained to provide benefits for miners who had retired before 1976 and their dependents. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 510, 118 S. Ct. 2131, 141 L.Ed.2d 451 (1998).

The 1978 Agreement did not work because several signatories left the mining business, "dumping" their retirees on the 1950 and 1974 Benefit Plans. The signatories that remained had to shoulder the burden of paying for the growing number of orphaned retirees, while at the same time paying for the health care of their own retirees. The rising costs of providing for orphaned retirees caused more signatories to leave the coal mining business, exacerbating the crisis. The coal industry thus was caught in a vicious circle that threatened to deprive more than 100,000 retired coal miners and their dependents of their promised lifetime health benefits. *See id.* at 511, 118 S. Ct. 2131.

Congress responded to the crisis by enacting the Coal Act in 1992. Congress wanted to avoid the problems that plagued the coal industry in the 1980s—too many unallocated retirees supported by signatory operators that did not have any connection to the retirees. The Act therefore assigned liability for retiree health benefits to "related persons" to signatory operators as well as to the signatory operators themselves. *See* 26 U.S.C. § 9706(a). As a result, if a signatory operator went out of business, a "related person" would be on the hook for the signatory operator's retirees. Only when the Commissioner could not locate a "related person" still "in business" would the rest of the coal industry have to support an "orphaned" retiree. *See* 26 U.S.C. § 9704(a)(3), (d), § 9706(a).

The Coal Act defines related persons in § 9701(c)(2)(A), which provides:

> (2) Related persons.—
>
> (A) In general.—A person shall be considered to be a related person to a signatory operator if that person is—
>
> (i) A member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;
>
> (ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or
>
> (iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within

> the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.
>
> *A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).*

26 U.S.C. § 9701(c)(2)(A) (emphasis added). The issue in the instant case is whether the definition of "related persons" includes successors in interest to signatory operators.[1]

II.

I agree with the majority's conclusion that a literal reading of § 9701(c)(2)(A) unambiguously excludes successors in interest to signatory operators. I therefore would not defer to the Commissioner's strained interpretation of the definition. I would nevertheless construe § 9701(c)(2)(A) to include successors in interest to signatory operators because I agree with the D.C. Circuit that the instant case is one of those "rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *R.G. Johnson Co. v. Apfel*, 172 F.3d 890, 895 (D.C. Cir. 1999) (quoting *United*

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[1] For purposes of my analysis, and in response to the majority's reasoning, I assume Jericol qualifies as a successor in interest to Shackleford. I would not reach this issue on appeal, however, because the district court has not ruled on the issue. *See R.G. Johnson Co. v. Apfel*, 172 F.3d 890, 895 (D.C. Cir. 1999) (refusing to consider whether a coal company qualified as a "successor in interest" to a signatory operator because the district court had not ruled on the issue).

States v. Ron Pair Enters., 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989)).

A literal interpretation of the definition of "related persons" causes a result that directly conflicts with Congress's stated purpose in enacting the Coal Act. Congress declared that its purpose in enacting the Act was "to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees." Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3037 (codified at note following 26 U.S.C. § 9701). Outside of the signatory operators, no entities are "more responsible" for plan liabilities than successors in interest to signatory operators. Here, for example, Jericol took over Shackleford's mining operations, employed many of its workers, and assumed its duties under the collective bargaining agreement with the UMWA. In addition, the asset purchase agreement between Shackleford and Jericol[2] included a clause allowing Jericol to use Shackleford's well-known corporate name. Jericol thus benefitted from the goodwill created, at least in part, from the work of the retirees that Jericol now attempts to dump on the rest of the coal industry.

A literal interpretation of the definition of "related persons," however, would turn Congress's stated purpose on its head: entities with only a tenuous connection to the retired coal miners would be jointly and severally liable for Fund benefits while direct successors to the signatory operators who employed the miners are excluded from liability. For example, under a literal interpretation of § 9701(c)(2)(A), a thrice-removed successor in interest to a food distributor under common control with a signatory coal mine operator would be liable for the health benefits of a signatory's retired coal miners, while a company like Jericol, a coal mining direct successor in interest to a signatory operator, would be excluded from liability. Congress could not have intended such an anomalous result.

[2] Jericol was then known as Irdell Mining, Inc.

My conclusion is in accord with the only other circuit to consider this issue. In *R.G. Johnson*, the D.C. Circuit stated that

> [i]n light of [the purpose of the Act] and the broad reach of the provisions imposing liability on related persons, we can think of no reason why Congress would have intended to impose liability for the beneficiaries on, for example, a successor in interest to a Coca-Cola bottling company under common control with a signatory coal mine operator while exempting a coal-mining successor in interest to that operator.

Id. at 895. The court therefore held that it would construe § 9701(c)(2)(A) to include successors in interest to signatory operators. *See id.*

In the instant case, the majority recognizes that a literal interpretation of "related persons" causes a result "that is, arguably, somewhat anomalous." Maj. op. at [35a]. However, seizing on the theory advanced in Judge Randolph's dissent in *R.G. Johnson*, the majority attempts to explain the anomalies by speculating that Congress may have intended to exclude successors in interest to signatory operators from liability to promote the sale of coal companies.

I disagree with the majority's theory because it presumes that Congress intended to promote the exact practice that necessitated legislative action in the first place. The widespread dumping of retirees by signatory operators leaving the coal industry was the principal cause of the coal industry's crisis. The remaining signatory operators were forced to shoulder the burden of paying for more orphaned retirees, thereby encouraging more signatories to leave the industry. In light of this history, it is unimaginable that Congress could have intended to promote the sale of coal companies to successors who would not be liable for Fund benefits.

Furthermore, excluding successors in interest from liability for retiree benefits does more than *promote* the sale of coal companies; it *actively encourages* the sale of coal companies. Under the majority's interpretation of the Act, coal companies are worth more to successors than they are to signatory operators. For instance, Jericol can avoid $237,000 in yearly contributions to retirees if successors are not liable under the Act. Other coal companies undoubtedly have significantly higher contributions under the Act.[3] A successor who can avoid these costs will be willing to pay more for a coal company than the value of the company as an ongoing entity, because the successor could avoid a major liability of the company.

Profit-seeking signatory operators therefore will maximize shareholder value by selling their assets to a successor, distributing the proceeds to shareholders,

[3] For instance, a signatory operator who has been in the industry since the 1960s would be liable for the health benefits for thirty years of retirees. Under the majority's analysis, a successor to this company would be liable for none of these benefits.

and then dissolving. The remaining signatory operators will have to shoulder the burden of paying for the retirees of signatories who leave the business, further raising their costs of doing business; the additional costs will, in turn, encourage more signatories to sell their assets to successors. The ultimate result would be the same dwindling funding base that Congress intended to rectify by passing the Act. The majority's theory thus suggests that Congress intended to cure the crisis in the coal industry by infecting it with part of the disease.[4]

Finally, the majority offers no explanation for why Congress was concerned with promoting the sale of coal companies, but was not concerned with promoting the sale of companies related to a signatory operator. Instead, the majority baldly states that "Congress rarely has to go as far as its logic would take it." Maj. op. at [35a]. However, as is evident from my previous analysis, it was *clearly illogical* for Congress to exclude successors in interest to signatory operators from liability in the first place. Thus, to accept the majority's theory, one must believe that Congress was inconsistently illogical.

[4] Some might suggest that coal companies are unlikely to attempt to profit from such a "loophole" in the Coal Act; however, this suggestion ignores the fact that coal companies have a long history of using the tools of successorship to maximize shareholder profits at the expense of workers and retirees. *See generally* Grant Crandall et al., *Hiding Behind the Corporate Veil: Employer Abuse of the Corporate Form to Avoid or Deny Workers' Collectively Bargained and Statutory Rights*, 100 W. Va. L. Rev. 537 (1998).

III.

The majority is rightfully cautious about judicially "rewriting" an unambiguous statute. Nevertheless, our duty is to give effect to the intent of Congress. Congress's intent is usually expressed in the plain meaning of a statute, but that is not always the case. The Supreme Court has stated that

> [l]ooking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists."

Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 455, 109 S. Ct. 2558, 105 L.Ed.2d 377 (1989) (quoting *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48, 49 S. Ct. 52, 73 L.Ed. 170 (1928)). Excluding successors in interest to signatory operators from liability for Fund benefits is plainly inconsistent with Congress's intent in enacting the Coal Act. I therefore would construe § 9701(c)(2)(A) as allowing the assignment of Fund beneficiaries to successors in interest to signatory operators. Accordingly, I dissent.

APPENDIX B

Coal Act Review Decision

Company Name: Jericol Mining, Incorporated

Company EIN: 61-0844927

Facts: Three PSCs assigned miners to Jericol Mining, Inc., EIN: 61-0844927. The operator's representative timely requested review of the assignment, alleging that the assignments were erroneous because Jericol Mining, Inc. is not the successor in interest of Shackleford Coal Co., Inc. The representative also requested an extension of 90 days in which to submit evidence to support the allegation.

The representative submitted additional evidence by letter dated June 9, 1994. The evidence consists of a copy of the contract wherein Irdell Mining, Inc. and Dale Company purchased the assets of Shackleford Coal Co., Inc. in 1973. The representative advises that Irdell Mining, Inc. for a period of time took the name Shackleford Coal Company, and later took the name Jericol Mining, Inc. The representative also stated that the partial purchase of assets by Irdell Mining and other terms of the contract establishes that Jericol Mining is *not* the successor in interest of Shackleford Coal.

The assignment of miners to Jericol Mining will depend on whether the purchase of Shackleford Coal was under conditions which will provide Jericol with the status of "successor" of Shackleford. Basically, when a business transfer is made to another owner who continues the

former owner's operation with little or no interruption or change, the new owner is a successor.

The elements that tend to support a finding that a business transfer was to a successor are: (1) employees of the former owner continue to work for the new owner with little or no interruption after the transfer; (2) the former owner transferred the business trade name to the new owner; (3) the former owner agrees not to compete with the new owner's business, or not to compete in the same geographical area; (4) the transfer includes sale of "good will," or the turning over of customer records, business records, contracts, leases, and the like; and (5) the prior owner agrees to work for the new owner as a consultant or employee. This list is not complete nor conclusive, and not all aspects must be present to establish that the transfer was to a successor.

The sales contract submitted by Jericol Mining's representative shows that Shackleford Coal sold its assets to Irdell Mining and Dale Company. The agreement was signed on behalf of Irdell Mining by James A. Sigmon, President, and on behalf of Dale by James A. Sigmon, General Partner. Since both purchasing companies are apparently owned by the same individuals, they can be considered to be the *same* company for assignment purposes under the Coal Act. The contract also requires Shackleford Coal to maintain the goodwill of its customers, provides that Irdell Mining will use the name of Shackleford, provides that Irdell Mining accept *all* outstanding contracts and agreements, and provides that non-compete agreements must be signed by all parties and submitted at the time of closing.

The records of the SSA (AEQY) shows that EIN 61-0844927 was issued in July 1973 to a company doing business as Shackleford Coal Company. The Form SS-4 shows that the reason for applying for the assignment of an EIN was: "Purchased going business." The AEQY also shows the company assigned this EIN later changed its name to Jericol Mining Incorporated.

The evidence clearly establishes that Jericol Mining, Inc. must be considered the successor in interest of Shackleford Coal Co., Inc. The sales agreement contains many of the criteria used to establish that the transfer of the business was to a successor, and the records of the SSA establish that the company now doing business as Jericol Mining, Inc. formally acknowledged the purchase of Shackleford Coal Co. and conducted business under the same name in 1973.

Decision: Jericol Mining, Inc., EIN 61-0844927, is the successor in interest of Shackleford Coal Company, Inc., as defined in the Coal Act. Accordingly, Jericol Mining is the appropriate assignment company for miners whose assignment is based on employment by Shackleford Coal.

/s/ JAMES M. SMALL
JAMES M. SMALL
Southeastern Program
Service Center
8/23/94

Social Security Administration
Important Information

Southeastern Program Service
Center
P.O. Box 10728
Birmingham, AL 35202
August 30, 1994

EIN: 61-0844927

JERICOL MINING, INC
C/O MCBRAYER, MCGINNIS, LESLIE
& KIRKLAND
ATTORNEYS AT LAW
P O BOX 1100
FRANKFORT, KY 40602-1100

We are writing to you about the miners assigned to you under the Coal Industry Retiree Health Benefit Act of 1992. Under this law, we assigned you responsibility for the payment of health and death benefit premiums for certain retired miners and their relatives who qualify. As you requested, we have reviewed the assignments.

What You Told Us

You told us that you are not the successor in interest to Shackleford Coal Company.

What We Have Decided

We had someone who did not make the assignments perform the review. Based on that review, we have determined that you are the successor in interest of Shackleford Coal Co. as defined in the Coal Act. The

sales contract you submitted shows that Irdell Mining purchased the assets of Shackleford Coal, that Shackleford Coal was required to maintain the goodwill of its customers, allowed Irdell to use the name of Shackleford after the purchase, transferred responsibility for *all* outstanding contracts and agreements, and required that non-compete agreements be signed and submitted at the time of closing. You have also advised us that Irdell did conduct business under the Shackleford name and subsequently changed the company's name to Jericol Mining. Therefore, you are still responsible for the health and death benefit premiums of the beneficiaries named on the enclosed list.

Enclosure(s):
Explanation of Review Decision

This decision does not pertain to other beneficiaries listed in any other notice of assignment that you may have received from another SSA office.

This decision is final. Under the Coal Industry Retiree Health Benefit Act of 1992 and our regulations, we cannot offer any hearing or other appeal of the decision, nor can we review this decision again unless, within 12 months of the notice of assignment, we decide the assignment reflects an error on the face of our records or was based on fraud.

If You Have Any Questions

If you have any questions about the decision explained in this letter, please call us at (205) 801-2600. If you do call, please have this letter with you. It will help us answer your questions. You can also write to us at the address shown at the top of this letter.

If you have any other questions, you should contact the UMWA Combined Benefit Fund at the address below:

UMWA Combined Benefit Fund
4455 Connecticut Avenue, N.W.
Washington, D.C. 20008
(202) 895-3700

/s/ CAROLYN W. NEYMAN
CAROLYN W. NEYMAN
Assistant Regional
Commissioner
Processing Center Operations

Explanation of Review Decision

Below we identify the miners and any eligible relatives whom we previously assigned to you. We also show the reason we have decided that you are still responsible for the coal industry health and death benefit premiums for the individuals.

A review of the earnings records shows that the miners listed below worked for you for the periods shown. In addition, the UMWA Combined Benefit Fund records show that you were a signatory to an UMWA agreement for the period shown below. Based on this, we determined that you were a signatory to an UMWA agreement, and the signatory operator, still in business, to employ the miner in the coal industry under an agreement for the longest period of time before 1978. After working for you, the miner did not work for any other coal industry employer.

(* denotes miner)

Beneficiary	SSN	Date(s) Miner Employed by Operator	Signatory Dates
*Wheeler E Fleenor	[REDACTED]	09/64-12/68 06/69	10/10/63- 12/06/77
Magdalene Fleenor	[REDACTED]		
*Clarence Kelly Juanita Kelly	[REDACTED]	12/65-06/73	10/10/63- 12/06/77
*G L Long Georgia Long Shawn D Long Brannon D Long	[REDACTED]	06/64-06/73	10/10/63- 12/06/77
*Lester Thomas Sarah Thomas	[REDACTED]	12/63-06/66	10/10/63- 12/06/77

Social Security Administration
Important Information

Northeastern Program
Service Center
P.O. Box 6300
Jamaica, N.Y. 11431

Date: September 8, 1994

EIN: 61-0844927

McBrayer, McGinnis, Leslie & Kirkland
Attn: Christopher M. Hill
P.O. Box 1100
Frankfort, KY 40602-1100

We are writing to you about the miners assigned to Jericol Mining, Inc. under the Coal Industry Retiree Health Benefit Act of 1992. Under this law, we assigned Jericol Mining, Inc. responsibility for the payment of health and death benefit premiums for certain retired miners and any relatives who qualify. As you requested, we have reviewed the assignment(s).

What You Told Us

You told us that Jericol Mining, Inc. should not be assigned miners that worked for the Shackleford Coal Company because the two companies are not related.

What We Have Decided

We had someone who did not make the assignments perform the review. Based on that review, we have determined Jericol Mining, Inc. is still responsible for the health and death benefit premiums of some, but not all, of the beneficiaries named in the letter we sent to

you on 09/28/93. While Jericol Mining, Inc. did not purchase the entire assets of the Shackleford Coal Company, they adopted use of the Shackleford name and continued operations under Shackleford's United Mine Workers Of America (UMWA) agreement. Therefore Jericol Mining, Inc. is the successor to Shackleford Coal Company. Enclosed is a list of the beneficiary(ies) for whom Jericol Mining, Inc. is still responsible, and a list of the beneficiary(ies) for whom they are not responsible.

This decision does not pertain to any beneficiary(ies) listed in other letter(s) of assignment received from another SSA office.

We will notify the United Mine Workers of America Combined Benefit Fund about this change.

This decision is final. Under the Coal Industry Retiree Health Benefit Act of 1992 and our regulations, we cannot offer any hearing or other appeal of the decision, nor can we review this decision again unless, within 12 months of the notice of assignment, we decide the assignment reflects an error on the face of our records or was based on fraud.

Enclosure(s):
Explanation of Review Decision

If You Have Any Questions

If you have any questions about the decision explained in this letter, please call us at 718-557-5505. If you do call please have this letter with you. It will help us answer your questions. You can also write to us at the address shown at the top of this letter.

If you have any other questions, you should contact the United Mine Workers of America (UMWA) Combined Benefit Fund at the address below:

UMWA Combined Benefit Fund
4455 Connecticut Ave. N. W.
Washington, D.C. 20008
(302) 895-3700

Anne Jacobosky
Assistant Regional Commissioner
Processing Center Operations

cc:
UMWA Combined Benefit Fund

Explanation of Review Decision

Below we identify the miner(s) and any eligible relatives that we previously assigned to Jericol Mining, Inc. We also show the reason we have decided that Jericol Mining, Inc. is still responsible for the coal industry health and death benefit premiums for the individual(s).

A review of the earnings record(s) shows that the miner(s) listed below worked for Shackleford Coal Company. The UMWA Combined Benefit Fund records show that Shackleford Coal Company is related to Jericol Mining, Inc., and that Shackleford Coal Company was a signatory to an UMWA agreement for the period(s) shown below.

Under the rules for how we assign premium responsibility, Shackleford Coal Company would have been the responsible operator because it employed the miner in the coal industry under an UMWA agreement, and employed the miner under an UMWA agreement for the longest period of time before 1978. However, as a related company, Jericol Mining, Inc. is responsible for the miner(s) and any eligible relatives named below.

Asterisk (*) denotes miner.

Miner	SSN	Date(s) Miner Employed by Signatory Operator	Signatory Date(s)
*Mink, William R. Mink, Lorene	[REDACTED]	12/63-06/73	10/10/63-12/06/77
*Thornbury, Sherman K.	[REDACTED]	3/66-9/70, 6/71	
*McCrary, Gillis McCrary, Ruby	[REDACTED]	12/63-06/73	

Coal Act Review Decision

Company Name:	Jericol Mining, Inc.
Address:	RT 1, Box 1000 Cumberland Gap, TN 37724-9801
EIN:	61-0844927

Nature of Protest:

The miner, Gillis McCrary ([REDACTED]), was assigned to Jericol Mining, Inc. based upon work for Jericol Mining, Inc. and its related company, Shackleford Coal Co., Inc. from 12/63 through 12/77 covered under an agreement. Jericol protested the assignment asserting that it was not related to Shackleford.

Evidence Reviewed:

Letter from company, Hot List, Pre-'78 List, ERQY, Miners' E/R, UMWA Records.

Rationale:

While Jericol admits purchasing part of Shackleford's assets in 1973, the company maintains it was not a successor in interest. However Jericol adopted use of the Shackleford name, continued to operate under Shackleford's UMWA agreement and otherwise acted as its successor. Therefore Jericol is Shackleford's successor. Work for related companies is combined in calculating liability assignment. Shackleford/Jericol was the last coal company to employ the miner and did so for a total of 141 months, by far the longest employment by a coal company. Therefore

the decision to assign the miner under category three was correct.

Determination:

The decision to assign Gillis McCrary ([REDACTED]) to Jericol Mining Inc. is affirmed.

Signature: [Illegible] Title: CRTA Date: 9/9/94

Coal Act Review Decision

Company Name:	Jericol Mining, Inc.
Address:	RT 1, Box 1000 Cumberland Gap, TN 37724-9801
EIN:	61-0844927

Nature of Protest:

The miner, Sherman K. Thornbury ([REDACTED]), was assigned to Jericol Mining, Inc. based upon work for its related company, Shackleford Coal Co., Inc. from 03/66 through 09/70 and 06/71 covered under an agreement. Jericol protested the assignment asserting that it was not related to Shackleford.

Evidence Reviewed:

Letter from company, Hot List, Pre-'78 List, ERQY, Miners' E/R, UMWA Records.

Rationale:

While Jericol admits purchasing part of Shackleford's assets in 1973, the company maintains it was not a successor in interest. However Jericol adopted use of the Shackleford name, continued to operate under Shackleford's UMWA agreement and otherwise acted as its successor. Therefore Jericol is Shackleford's successor. Shackleford was the last coal company to employ the miner. Since Shackleford is a pre-78 signatory and employed the miner for more than 24 months the assignment must be made under category three. Shackleford employed the miner longer than any other coal company that is still active

or has an active related company. Therefore the original assessment was correct.

Determination:

The decision to assign Sherman K. Thornbury ([REDACTED]) to Jericol Mining Inc. is affirmed.

Signature: [Illegible] Title: CRTA Date: 9/9/94

Coal Act Review Decision

Company Name: Jericol Mining, Inc.
Address: RT 1, Box 1000
Cumberland Gap, TN 37724-9801
EIN: 61-0844927

Nature of Protest:

The miner, William Mink ([REDACTED]) was assigned to Jericol Mining, Inc. based upon work for its related company, Shackleford Coal Co., Inc. from 12/63 through 12/73 covered under an agreement. Jericol protested the assignment asserting that it was not related to Shackleford.

Evidence Reviewed:

Letter from company, Hot List, Pre-'78 List, ERQY, Miners' E/R, UMWA Records,

Rationale:

While Jericol admits purchasing part of Shackleford's assets in 1973, the company maintains it was not a successor in interest. However Jericol adopted use of the Shackleford name, continued to operate under Shackleford's UMWA agreement and otherwise acted as its successor. Therefore Jericol is Shackleford's successor. Shackleford was the last coal operator, except for Jericol itself, to employ the miner. Since neither company is a 1978 signatory, the assignment must be made under category three. Shackleford employed the miner for 88 months,

longer than any other coal company. Therefore the original assessment was correct.

Determination:

The decision to assign William Mink ([REDACTED]) to Jericol Mining Inc. is affirmed.

Signature: [Illegible] Title: CRTA Date: 9/9/94

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

CIVIL ACTION No. 96-0148-B

SIGMON COAL COMPANY, INC. AND
JERICOL MINING, INC., PLAINTIFFS

v.

KENNETH S. APFEL, COMMISSIONER OF
SOCIAL SECURITY, ADMINISTRATION, DEFENDANT

[Filed: Nov. 18, 1998]

ORDER

BY: GLEN M. WILLIAMS
SENIOR U.S. DISTRICT JUDGE

For the reasons stated in the memorandum opinion entered this day, it is hereby ORDERED that Plaintiff's Motion for Summary Judgment is GRANTED and Defendants' Motion for Summary Judgment is DENIED. It is further ORDERED that Defendant withdraw the assignments challenged by Plaintiff Jericol in this case, and notify the Trustees of the United Mine Workers of America Combined Benefit Fund that such assignments have been withdrawn. Furthermore, Defendant shall be enjoined from assigning additional retirees of Shackleford Coal Company, Inc. (referred to

as "Shackleford One" in the court's opinion) to Plaintiff Jericol on the basis that Plaintiff is a related person to Shackleford Coal Company, Inc. This case shall be stricken from the docket of this court.

ENTER: This 18 day of November, 1998.

/s/ GLEN M. WILLIAMS
GLEN M. WILLIAMS
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Civil Action No. 96-0148-B

SIGMON COAL COMPANY, INC. AND
JERICOL MINING, INC., PLAINTIFFS,

v.

KENNETH S. APFEL, COMMISSIONER OF
SOCIAL SECURITY, DEFENDANT

[Filed: Nov. 18, 1998]

MEMORANDUM OPINION

GLEN M. WILLIAMS, Senior District Judge.

I. Introduction

Plaintiffs filed this action June 25, 1996, alleging that Defendant Kenneth S. Apfel, Commissioner of Social Security (hereinafter, "Commissioner"),[1] in the course

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[1] Shirley S. Chater, then-Commissioner of Social Security, was named as Defendant when this case was filed. John J. Callahan was substituted as Defendant upon his appointment as Acting Commissioner of Social Security on March 1, 1997, pursuant to 42 U.S.C. § 405(g). Kenneth S. Apfel, current Commissioner of Social Security, was sworn into office on September 29, 1997, and

of assigning beneficiaries in the United Mine Workers of America Combined Benefit Fund (hereinafter, "Benefit Fund") to responsible operators under the Coal Industry Retiree Health Benefit Act of 1992 (hereinafter, "Coal Act"),[2] wrongfully assigned beneficiaries to Plaintiff Jericol Mining, Inc. (hereinafter, "Jericol").[3] Discovery was had and Plaintiffs moved for summary judgment. Defendant opposed Plaintiffs' Motion for Summary Judgment and submitted its own Motion for Summary Judgment. The Trustees of the Benefit Fund filed a brief as *amicus curiae*, also opposing the Plaintiff's Motion for Summary Judgment.

Action on the case was stayed pending the United States Supreme Court's decision in *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 118 S. Ct. 2131, 141 L.Ed.2d 451 (1998). Thereafter, Plaintiffs filed a supplemental complaint alleging that the statute used to assign beneficiaries to responsible operators[4] was unconstitutional as applied to them. An October 22, 1998 telephone conversation between the parties, *amicus curiae* and the court confirmed that no additional filings would be made as to the matter of statutory interpretation and that the Motions were ripe for decision as to the statutory interpretation issue. The court exercises jurisdiction in this case under 28 U.S.C. § 1331, because

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thereafter was substituted as Defendant in this action, also pursuant to 42 U.S.C. § 405(g).

[2] 26 U.S.C. § 9701, *et seq.*

[3] Sigmon Coal Company, Inc. joins Jericol as a plaintiff in this action apparently because they are related persons under the Coal Act, *see* 26 U.S.C. § 9701(c)(2), and thus jointly and severally responsible for any amounts due from either of them. 26 U.S.C. § 9704(a).

[4] 26 U.S.C. § 9706(a).

the case arises under a federal statute. Venue is proper under 28 U.S.C. § 1391(e). Thus, the court will now decide both parties' Motions for summary judgment.

II. Background of the Coal Act

The Coal Act was intended to stabilize health benefits for United Mine Workers Association (hereinafter, "UMWA") retirees.[5] The Act contains a statutory scheme for determining which "signatory operator" from the coal business[6] must pay annual premiums for each beneficiary in the Benefit Fund. The assignment statute, found at 26 U.S.C. § 9706(a), also provides that a "related person" to a signatory operator may be held accountable for premiums in cases where the signatory operator is no longer in business,[7] but the related person continues in business. The Commissioner of Social Security was directed to administer this statutory scheme.[8]

Application of the statutory scheme in 26 U.S.C. § 9706(a) proceeds through three levels of priority, as found in the statute below:

> For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related

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[5] 524 U.S. at 514, 118 S. Ct. at 2141-42.

[6] 26 U.S.C. § 9701(c)(1).

[7] "Business" is defined broadly in the Coal Act to include "conduct[ing] or deriv[ing] revenue from any business activity, whether or not in the coal industry." 26 U.S.C. § 9701(c)(7).

[8] Originally, the Secretary of Health and Human Services bore responsibility for administering the statute (Plaintiff's Memo. at 3).

person with respect to which) remains in business in the following order: (1) First, to the signatory operator which—(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years. (2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry. (3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

After this process is completed, a beneficiary may remain unassigned.[9] In such a case, transfer payments from the Abandoned Mine Reclamation Fund (hereinafter, "AML Fund") will be made to the Benefit Fund to pay the premiums of such beneficiaries.[10] If AML Fund transfer payments are insufficient to pay those premiums, assigned operators will pay the difference on a pro rata basis.[11]

III. Facts

Plaintiff Jericol was originally formed in 1973 as Irdell Mining, Inc. (hereinafter, "Irdell"), by James and

[9] *See* 26 U.S.C. § 9704(d).

[10] 26 U.S.C. § 9705(b).

[11] 26 U.S.C. § 9704(a)(3) and (d).

Charles Sigmon and Fred Langley (James Sigmon Affidavit at 1). Shortly after the formation of Irdell, it and The Dale Company purchased most of the operating assets, coal inventory, supplies, leases and contracts of Shackleford Coal Company, Inc. (hereinafter, "Shackleford One"). The contract for sale references several Exhibits listing the precise asssets, leases, contracts and commitments transferred. These Exhibits have not been made part of the record. Although there was common ownership between Dale and Irdell, no owner of either Dale or Irdell was an owner of Shackleford One. Irdell changed its name, operating as Shackleford Coal Company (hereinafter, "Shackleford Two") until 1977, when it again changed its name to Jericol (James Sigmon Affidavit at 2). While Shackleford One was a signatory to a coal wage agreement while it was in business, Shackleford Two was only signatory to the 1974 wage agreement.

In late 1993, Defendant notified Plaintiff Jericol that Plaintiff had been assigned responsibility for the premiums of 10 UMWA retirees and 10 of their dependents. Ten miners or dependents were assigned on the basis that Jericol was a related person to Shackleford One, a signatory operator. This assignment was based on 26 U.S.C. § 9706(a)(3).[12] Jericol challenged this decision, which was affirmed as the Commissioner found that Jericol was the "successor in interest" of Shackleford One. Shackleford One was the entity those miners had actually worked for and would have been the assigned signatory operator had it continued in business. In

[12] This information is gleaned from the letters and attachments sent from the Social Security Administration to Jericol as part of the administrative process.

1995, 49 additional retirees and 60 of their dependents were assigned to Jericol. Of these miners, 44 were assigned on the basis of their employment with Shackleford One. Jericol challenged the assignments which were based upon the Commissioner's position that Jericol was a successor in interest to Shackleford One, and thus a related person responsible for premium payments.

The following year, after this action was filed, 38 additional miners, plus dependents, were assigned to Jericol, 34 of them based upon employment with Shackleford One. Again, Jericol appealed the Commissioner's decision as it pertained to miners for whom liability for premiums was based upon the Defendant's classification of Jericol as a related person to Shackleford One. No final determination was issued by the Commissioner as to the 1995 and 1996 challenges by Jericol. In 1997, eight additional miners and dependents were assigned to Jericol, with three miners being assigned on the basis of their prior work for Shackleford One. Jericol planned to appeal those assignments, but contended that it should not be required to exhaust its administrative remedies before seeking relief from this court because of the similarity of the law and facts underlying each assignment of Shackleford One's miners to Jericol. After consideration, this court agrees.[13]

[13] *See Sager Coal Co.* v. *Apfel*, No. 96-1107, slip op. at 11-12 n.5 (W.D. Penn. Jan. 12, 1998) (noting the futility of further administrative challenges where, as here, the Commissioner is making repeated Coal Act assignments based upon similar facts and law).

In all, more than 100 retired miners plus their numerous dependents were assigned to Jericol as part of Defendant's assignment process. Of these assignments, more than 80 miners were assigned because Jericol was viewed as a successor in interest to Shackleford One. Dependents of the 80 miners thus assigned were also assigned to Jericol on the same basis. It should be clarified that Jericol does not herein appeal all assignments to it. Rather, this case only involves challenges to assignments made on the basis that it is responsible for premium payments on behalf of Shackleford One's miners.

IV. Legal Discussion

(A) Summary Judgment Standard

A party moving for summary judgment will have its motion granted if there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. In considering a grant of summary judgment, the court may consider the pleadings, depositions, answers to interrogatories, and admissions on file, as well as any affidavits filed with the court. Fed. R. Civ. P. 56(c). The court must view the evidence under consideration in the light most favorable to the non-moving party.[14]

(B) Standard of Review of Agency Action

A finding of an agency, such as the one represented by Defendant, may be set aside by this court only if the

[14] *Cuddy* v. *Wal-Mart Super Ctr., Inc.*, 993 F. Supp. 962, 965 (W.D. Va. 1998) (citing *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986)).

finding is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984), is the landmark case on review of agency decisions. It established a two-prong test for determining the proper amount of deference to be given.

Under the *Chevron* test, the court must first decide "whether Congress has directly spoken to the precise question at issue."[15] If the statute is plain on its face, the court must give effect to the expressed intent of Congress, without consideration of the agency's decision.[16] In addition to "the particular statutory language at issue," the court must consider "the language and design of the statute as a whole."[17] However, if Congress has left a gap in the statute to be filled by the agency, the court must then determine whether the agency's decision is "based on a permissible construction of the statute."[18] If it is so based, then considerable deference must be given to the agency's interpretation of the regulations it promulgates to fill that gap.[19]

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[15] *Chevron*, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L.Ed.2d 694.

[16] *Elliott* v. *Adm'r, Animal and Plant Health Inspection Serv.*, 990 F.2d 140, 144 (4th Cir. 1993).

[17] *Soc. Sec. Adm'n* v. *Fed. Labor Relations Auth.*, 956 F.2d 1280, 1283-84 (4th Cir. 1992) (citing *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 100 L.Ed.2d 313 (1988)).

[18] *Chevron*, 467 U.S. at 843, 104 S. Ct. 2778.

[19] 467 U.S. at 843-44, 104 S. Ct. 2778.

(C) Legal Analysis

The matter of whether Congress has spoken clearly in enacting the Coal Act has been addressed by two other district courts earlier this year, with both finding the language of the Act to be plain.[20] At least one circuit court has also held that the language of the Act is plain.[21] In particular, one of the district courts has so held with respect to 26 U.S.C. § 9701(c)(2)(A).[22] This section is the statutory law governing the issue at hand, namely whether a successor to a defunct signatory operator can be held accountable as a "related person" to that signatory operator.[23] This court agrees with the rationale and findings of the above-cited courts, and concludes that Congress has plainly and clearly expressed itself in the statutory language at issue. Therefore, for the reasons stated below, the court must give effect to the expressed Congressional intent, as set

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[20] *See R.G. Johnson*, 994 F. Supp. 10, 14 (holding that 26 U.S.C. § 9701(c)(2)(A) has a plain meaning) and *Sager Coal Co.* v. *Apfel*, No. 96-1107, slip op. at 19 (W.D. Penn. Jan. 12, 1998) ("Section 9706(a) of the Coal Act is unambiguous").

[21] *Eastern Enters.* v. *Chater*, 110 F.3d 150, 155 (1st Cir. 1997) ("[T]he first step of the Chevron pavane is fully dispositive. Section 9706(a) of the Coal Act unambiguously delineates a classification regime."), *rev'd sub nom. on other grounds, Eastern Enters.* v. *Apfel*, 524 U.S. 498, 118 S. Ct. 2131, 141 L.Ed.2d 451 (1998).

[22] *R.G. Johnson*, 994 F. Supp. 10.

[23] This issue is distinct from that addressed by 26 U.S.C. § 9706(b)(2), which provides for liability to be transferred to a successor where liability has already been assigned to a signatory operator, when such succession occurs after the enactment date of the Coal Act. *See R.G. Johnson Co., Inc.* v. *Apfel*, 994 F. Supp. 10, 14 (D.D.C. 1998).

out in the statutory language, rather than deferring to the Commissioner's decision.

The classification regime of 26 U.S.C. § 9706(a) does not provide, directly or indirectly via the definition of related persons at 26 U.S.C. § 9701(c)(2), for liability to be laid at the door of successors of defunct signatory operators. Defendant and *amicus curiae* contend otherwise, with the former arguing both that the language is broad enough and contains gaps for its regulations to fill (Defendant's Memo. at 15), and that "the record shows that Jericol meets the statutory criteria for a successor company" (*Id.* at 13). However, there is no such entity as a "successor company" anywhere in the Coal Act. *Amicus curiae* states that a " 'successor in interest' is a related person" (Amicus Memo. at 11), neglecting the last line and a half of the final sentence of 26 U.S.C. § 9701(c)(2). The language urged by Defendant and *amicus curiae* simply was not included by Congress when it enacted this statute. The court is also aided by the rule of statutory construction that when "'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' This principle obtains here . . . [as] at two other points the Coal Act makes explicit reference to successors."[24]

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[24] 110 F.3d 150, 155 (citing *Brown v. Gardner*, 513 U.S. 115, 120, 115 S. Ct. 552, 130 L.Ed.2d 462 (1994)), *rev'd on other grounds*, 524 U.S. 498, 118 S. Ct. 2131, 141 L.Ed.2d 451.

Defendant has imposed liability on the basis of Plaintiff Jericol's supposed status as a related person. "Related persons" are defined in 26 U.S.C. § 9701(c)(2). There are four types of related persons under that statute, the first three set out in individual clauses and the last one encompassing "a successor in interest of any person described in clause (i), (ii), or (iii) of 26 U.S.C. § 9701(c)(2)(A)." The text of 26 U.S.C. § 9701(c)(2)(A) reads:

> A person shall be considered to be a related person to a signatory operator if that person is—(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator; (ii) a trade or business which is under common control (as under section 52(b)) with such signatory operator; or (iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest [is] as a limited partner. A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

The court finds that Congress has drafted this section in language which is very plain and clear. If an entity meets the criteria for any of these clauses, liability may attach. Additionally, a successor to persons described in the clauses may be liable.

As in *R.G. Johnson*, Defendant here does not claim that Jericol meets any of the requirements of clauses (i), (ii), or (iii). Neither does it contend that Shackleford One met any of those requirements (Defendant's Memo.

at 15), other than the contention that a signatory operator is described in those clauses.[25] Defendant does contend that the language of the final sentence of 26 U.S.C. § 9701(c)(2) is broad enough to allow use of its successor policy regulations which treat Jericol as a related person. The court disagrees, because the plain, straight-forward statutory language contains no gap left open for filling by the Defendant's regulations and policies. It clearly states that "a related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii)."

A "successor in interest" is undefined by the Coal Act. Despite the comprehensive briefs and arguments of the parties and *amicus curiae* on this issue, it is not necessary for the court to determine what the term means. Assuming, without deciding, that the Commissioner has the authority to interpret the term and has reasonably done so to classify Jericol as a successor in interest (Defendant's Memo. at 5), Jericol plainly did not succeed to the interest of "any person described in clause (i), (ii), or (iii)" of 26 U.S.C. § 9701(c)(2)(A).

The court finds that a signatory operator is not described by any of those three clauses. The words "signatory operator" are used in the clauses, but so are the words "limited partner." A full reading of the statute makes it clear that limited partners are in fact not to be considered related persons. There is definitely a distinction between "describing" a person and

[25] Defendant's Memo. at 21 (stating that ". . . the express language of the statute 'reaches forward' to impose joint and several liability on 'related persons' of responsible operators, *specifically including* the operators' successors. . . ." [emphasis in original]) and Amicus Memo. at 16.

merely mentioning or naming them, and signatory operators are merely named and mentioned in the clauses. In fact, Congress demonstrated this distinction when it described signatory operators by defining them in 26 U.S.C. § 9701(c)(1).

Only through the use of its regulations is Defendant able to justify the assignments challenged by Plaintiffs. Defendant's position thus "depends upon the addition of words to a statutory provision which is complete as it stands,"[26] as several other courts have noted.[27] "Adoption of [the Defendant's view] would require amendment rather than construction of the statute, and it must be rejected here,"[28] where the plain language of the statute clearly reflects Congressional intent. There is simply no room for Defendant's successor policy regulations in this statute, because Congress has left no gaps to be filled by Defendant. Defendant's sole responsibility under this statute is to administer a very plain and simple assignment scheme, not to make regulations which correct perceived inequities.

As the court has concluded above that Congress had a clearly expressed intent in enacting the Coal Act, this court is duty-bound to give effect to that intent. Although Defendant and *amicus curiae* may feel that

[26] 481 U.S. 454, 463, 107 S. Ct. 1855, 95 L.Ed.2d 404.

[27] *Eastern Enters.*, 110 F.3d 150, 155, *rev'd on other grounds*, 524 U.S. 498, 118 S. Ct. 2131, 141 L.Ed.2d 451 (noting the "unambiguously delineate[d] . . . classification regime" of the Coal Act's assignment provisions); *R.G. Johnson*, 994 F. Supp. 10, 15-16; *Sager Coal*, No. 96-1107, slip op. at 21.

[28] 481 U.S. 454, 463, 107 S. Ct. 1855, 95 L.Ed.2d 404.

the policy underlying the Coal Act is unsound,[29] the law is as Congress has written it and it is not the duty of this court to change the words of Congress.

V. Conclusion

For the foregoing reasons, the court concludes that the statutory language clearly reflects Congressional intent in enacting the Coal Act and thus the application of any gap-filling rules by Defendant is foreclosed. Thus, Plaintiff's Motion for Summary Judgment is GRANTED and Defendant's Motion for Summary Judgment is DENIED.

The Clerk is directed to send certified copies of this Memorandum Opinion to all counsel of record.

ENTER: this 18 day of November, 1998.

/s/ GLEN M. WILLIAMS
GLEN M. WILLIAMS
SENIOR UNITED STATES
DISTRICT JUDGE

[29] Amicus Memo. at 15-16 (alleging a "completely absurd result" is reached under the position advocated by Plaintiffs and accepted by this court, and terming the statutory requirement of a controlled group of corporations in § 9701(c)(2)(A)(i) a "wholly irrelevant factor") and Defendant's Memo. at 28 (claiming that a "literal application of the language of the Coal Act" will produce an absurd result and "could result in unreasonable situations").

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Civil Case No. 96CV148-B

SIGMON COAL COMPANY, INC.;
JERICOL MINING, INC., PLAINTIFFS

v.

KENNETH S. APFEL, COMMISSIONER,
SOCIAL SECURITY ADMINISTRATION, DEFENDANT

[Filed: Dec. 18, 1998]

ORDER

Upon consideration of Memorandum of Defendant's Motion for Reconsideration, Plaintiffs' opposition thereto, and the entire record in this matter, it is hereby:

ORDERED that Defendant's Motion be **DENIED**. It is further **ORDERED** that Defendant withdraw the assignments challenged by Plaintiff Jericol in this case, and notify the Trustees of the United Mine Workers of America Combined Benefit Fund *and* Plaintiff Jericol within ten (10) days of the entry of this Order that such assignments have been withdrawn. Furthermore, Defendant shall be enjoined from assigning additional

retirees of Shackleford Coal Company, Inc. (referred to as ("Shackelford One") in the court's opinion) to Plaintiff Jericol on the basis that Plaintiff is a related person to Shackleford Coal Company, Inc. This case shall be stricken from the docket.

ENTERED this 18 day of December, 1998.

/s/ GLEN M. WILLIAMS
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1219
CA-96-148-2

SIGMON COAL COMPANY, INCORPORATED;
JERICOL MINING, INCORPORATED,
PLAINTIFFS—APPELLEES

v.

KENNETH S. APFEL, COMMISSIONER OF
SOCIAL SECURITY, DEFENDANT—APPELLANT

TRUSTEES OF THE UNITED MINE WORKERS
OF AMERICA COMBINED BENEFIT FUND,
AMICUS CURIAE

[Filed: November 15, 2000]

On Petition for Rehearing and Rehearing En Banc

Appellant filed a petition for rehearing and rehearing en banc.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of the judges in active service in

favor of rehearing en banc. Judges Motz and King voted to rehear the case en banc, and Chief Judge Wilkinson, and Judges Widener, Wilkins, Niemeyer, Luttig, Williams and Traxler voted against rehearing en banc. Judge Michael was disqualified from participation in the case.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Traxler for the Court.

For the Court,

/s/ PATRICIA S. CONNOR
PATRICIA S. CONNOR
CLERK

APPENDIX G

FURNISHING EARNINGS INFORMATION
July 1995

SUPPLEMENTAL COAL ACT REVIEW INSTRUCTIONS #4
July 1995

These instructions reflect the current policy, and are to be used in conjunction with POMS RM T01402ff and Supplemental Coal Act Review Instructions #1, #2 and #3.

A. DETERMINING THE ASSIGNEE WHEN THE SIGNATORY OPERATOR IS INACTIVE

Coal Act assignments, whenever possible, are made to the signatory operator that employed the miner in the coal industry. However when this is not possible because the signatory operator is inactive, then consider the following when determining the correct assignee.

1. If the signatory operator, or its "alter ego" (see Section B. below) is inactive;

Then make the assignment to the active person (company) related to the signatory operator that employed the miner in the coal industry (see Section C. below).

2. If the related person (company) is inactive;

Then make the assignment to the active "successor/successor-in-interest" ("successor") to:

a. a related person of the signatory operator; or if none

b. the signatory operator that employed the miner in the coal industry.

(See Section D. below.)

B. AN "ALTER EGO"

An "alter ego" is created when the same person(s) (company) controls the assets of a company following a *technical* change of identity or structure without any real change in ownership or management (e.g., the "alter ego" is, or stands in the place of, the signatory operator).

A business reorganization may have the appearance of creating a "successor" company when, in fact, there is no change in ownership. Therefore, the new company is merely an "alter ego" of the predecessor company.

Examples of an "alter ego" are:

- A sole proprietor who incorporates a business, but continues to control its operations.
- A company which changes its name, but continues to operate as before.

For assignment purposes under the Coal Act, treat an "alter ego" the same as you would treat its predecessor (e.g., as if there had been no change in ownership).

C. A "RELATED PERSON"

For purposes of the Coal Act, a "related person" (company) is a company that is:

- a member of a controlled group of corporations which includes the signatory operator; or
- a trade or business which is under common control with the signatory operator; or
- any other person who has a partnership interest (other than as a limited partner) or joint venture with a signatory operator in a business in the coal industry, if that business employed eligible miners.

In addition, the relationship had to have been in effect as of July 20, 1992 or, if earlier, the time immediately before the coal operator went out of business.

NOTE: A related person can also include a "successor" to one of the above entities, or a "successor" to the signatory operator.

D. A "SUCCESSOR" OR "SUCCESSOR-IN-INTEREST"

Addendum to POMS RM T01402.051, and Supplemental Coal Act Review Instructions # 3, Section O.

NOTE: This is a change-of-position on "successor company" policy, and is effective with decisions made on or after March 20, 1995.

Although there is a provision in the Coal Act for assignments to "successors" and "successors-in-

interest" to "related persons," the Coal Act does not specifically provide for assignments to "successors" or "successors-in-interest" to signatory operators. However, the Coal Act does permit assignments to "successors" and "successors-in-interest" to *defunct* (inactive) signatory operators.

Based on the above, "successors" and "successors-in-interest" are another type of "related person," and are to be treated as a "related person" for purposes of making assignments under the Coal Act. (Also see Section D.2. below.)

1. A "successor" (this includes the "successor-in-interest") is one who:

- by purchase, merger, consolidation, or other means of transfer, acquires substantial assets from another; AND
- continues running the same operation in the same location as the former owner with little or no interruption; AND
- uses many of the same employees who worked for the former owner.

NOTE: The difference between a "successor" and an "alter ego" is that with the former there is an actual change in ownership.

2. "Successors" are the lowest priority (last resort) among "related persons" of a signatory. Therefore, do *not* assign miners to a "successor" if the signatory operator is still in *any kind* of business at the time the assignment is made, or if there is a "related person" as defined in Section C. above.

3. If the signatory is inactive, but has both a "successor" and a non-successor "related person" (company) that are still active;

Then make the assignment(s) to the non-successor "related person" (company).

E. ASSIGNING TO THE "SUCCESSOR TO THE SUCCESSOR"

A "successor" to a signatory operator may also have a "successor." In fact, there can be a series of such "successors."

EXAMPLE: Company A sold its mining operation to Company G which continues the operation at the same site using most of the same employees. Company G is the "successor" to Company A. Company G then sells the mining operation to Company H which continues the operation at the same site using most of the same employees.

Based on this example, Company H is the "successor" to Company G's mining operation.

For assignment purposes (and using the above example), if Company A is "out of business," but Company G is "in business," then the miners who worked for Company A can be assigned to Company G as the "successor" to Company A. However, if both Company A and Company G are "out of business," then the miners who worked for Company A can be assigned to Company H (the "successor to the successor" of Company A).

F. ASSUMPTIONS REGARDING "SUCCESSORS"

For assignment purposes, assume that inactive signatory operators do *not* have "successors" or "successors-in-interest," absent information to the contrary. However, if a "successor" or "successor-in-interest" issue is raised, and it is pertinent to the reassignment/review decision, request scouting from OCRO (e.g., obtain microfilm of the original wage reports for the inactive signatory and the "successor") to determine whether most of the former owner's employees were employed by the purchaser.

Other evidence of "successor relationships" can be found in State corporation records, remarks on the paper pre-1978 signatory list, and records maintained by the Fund.

G. EXAMPLES OF "SUCCESSOR" RELATIONSHIPS

EXAMPLE 1: Company W sold its mining operation to Company X. Company X continues the mining operation at the same site using most of the same employees that Company W had used. Company W goes "out of business."

Based on this example:

- Company X is the "successor" to Company W, and is assignable for any eligible miners employed by Company W; AND
- Company W is *not* assignable under the Coal Act because it is "not in business."

EXAMPLE 2: Company W sold its mining operation at Mine A to Company X. Company X continues the mining operation at the same site using most of the same employees that Company W had used. Company W continues mining operations at Mine B and Mine C.

Based on this example:

- Company X is the "successor" to Company W's mining operation at Mine A; BUT
- Company W remains assignable under the Coal Act because it is "in business."

EXAMPLE 3: Same as in Example 2, except Company W sold its Mine B mining operation to Company Y and its Mine C mining operation to Company Z. Company W then goes "out of business." Companies X, Y and Z continue the mining operations at the respective sites, and use most of the same employees that Company W had used.

Based on this example:

- Company X is the "successor" to Company W's mining operations at Mine A, and is assignable for any eligible miners employed by Company W at Mine A;
- Company Y is the "successor" to Company W's mining operation at Mine B, and is assignable for any eligible miners employed by Company W at Mine B;
- Company Z is the "successor" to Company W's mining operation at Mine C and is assignable for

any eligible miners employed by Company W at Mine C; AND

- Company W is *not* assignable under the Coal Act because it is "not in business."

EXAMPLE 4: Company D (a pre-78 signatory) reorganized and created a new company within its organization (Company J). Company J (a 1978 and later signatory) conducted mining operations at a different site, and hired different employees. Company D remained "in business" but sold Company J to Company T on January 9, 1990. Company T continued the mining operation at the same site using most of the same employees that Company J used. Company J goes "out of business."

Based on this example:

- Company T is the "successor" to Company J, and is assignable under the Coal Act (priority #1) for those miners it and/or Company J employed;

- Company D is assignable under the Coal Act (priority #3) for those miners it employed; AND

- Company J is not assignable under the Coal Act because it went "out of business."

EXAMPLE 5: Same as Example 4, except Company J was sold to Company T on December 2, 1992.

Based on this example:

- Company D and Company J are related persons under the Coal Act;

- Company D is assignable under the Coal Act (priority #3) for those miners it and/or Company J employed;

- Company T (the "successor" company) is not assignable under the Coal Act because Company D (the related company) is "in business;"

- Company J is not assignable under the Coal Act because it went "out of business."

EXAMPLE 6: Company R (a pre-78 signatory) had both mining and non-mining operations. Company R reorganized all of its non-mining operations under one sister corporation (Company QR), and its mining operations under another sister corporation (Company SR). Thereafter, Company R ceased to exist in its original corporate form. Aside from this change in corporate structure, Company QR and Company SR continued to operate under the same ownership and management as Company R. Company SR became a 1978 and later signatory. Both Company QR and SR remain "in business." Based on this example:

- Companies QR and Company SR did *not* create "successor" relationships to Company R; AND

- Company R's reorganization constitutes a continuation of the same operations; AND

- Both Company QR and Company SR are the "alter ego" of Company R.

Therefore, covered work for Company R and Company SR would be assigned to Company SR for purposes of making assignments under the Coal Act.

NOTE: The non-mining operation (Company QR) is not considered for purposes of Coal Act assignments unless Company SR is "out of business" at the time an assignment(s) is made.

H. PRIVATE AGREEMENTS BETWEEN SELLER AND BUYER

SSA is not bound, for Coal Act assignment purposes, by any private agreement between the seller and the buyer of coal mining assets as to the reimbursements to be made to the seller for past liabilities. That is, if the buyer of the coal mining assets agrees to indemnify (assume responsibility for) or reimburse the seller for employee/retirement costs, this does not mean that the assignment should be made to the buyer instead of the seller.

I. STATUS OF THE SELLER AFTER THE SALE

The status of the seller after the sale of its mining operation/assets determines whether it is assignable under the Coal Act.

1. If the seller (or a related company) remains "in business," AND has the highest priority for assignment;

Then make the assignment to the seller (or the related company).

2. If the seller (and any related companies) is "out of business," AND sold all of its assets to the buyer;

Then evaluate the purchase agreement, and the other evidence, to determine whether the sale created a

"successor" relationship with the buyer; AND make the assignment based on your determination.

J. DETERMINING WHERE TO MAIL NEW NOTICES OF ASSIGNMENT

Several assigned operators have already authorized, in writing, representatives to act on their behalf in administrative matters under the Coal Act. Based on these authorizations, we have mailed requested earnings records (and the basis for the assignments), Coal Act review decisions and/or correspondence to these authorized representatives. However, the authorizations already in file:

- were received before any additional assignments were made;

- are based on current reviews; and

- pertain to the administrative review process only.

Therefore, mail all new notices of assignment to the assigned operator.

EXCEPTION: See Section J.2. below.

* * * * *

months of the time SSA sent the notice of assignment;

Then reopen and reverse the decision, and use the language provided in Supplemental Coal Act Review Instructions #3, Section X, Exhibit 2, item 6.

b. If the evidence does not clearly reflect that our records are in error AND the decision to reopen is

made after 12 months of the time SSA sent the notice of assignment;

Then deny the request to reopen, and affirm the decision. (Use the language provided in Supplemental Coal Act Review Instructions #3, Section X, Exhibit 2, item 6.)

6. Assignee Alleges a "Successor Relationship" is Involved

Reopen and change the assignment/review decision if the assignee requests a reopening based on a "successor relationship" as clarified in Section D above—provided the assignment would have been made to the "successor" company under this clarification.

Also, reopen and change the assignment if you determine that a "successor relationship" is involved, AND the assignment would have been made to a "successor" company under this clarification.

NOTE: A "successor relationship" includes "successors" and "successors-in-interest."

M. UNDELIVERABLES

It is SSA's role to make assignments and review decisions, and to mail the appropriate notices to the assignees. It is the Fund's role to bill the assignees and collect the premiums.